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State of Utah v. John R. Pinder : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH, Plaintiff-Appellee, v. JOHN R. PINDER, Defendant-Appellant.	Case No. 20030484-SC

BRIEF OF APPELLANT

Appeal from Conviction and Sentence and Denial of Motion for New Trial
Entered by the Honorable Lynn W. Davis In the Fourth Judicial District
Wasatch County, State of Utah

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STATEMENT OF JURISDICTION

This is an appeal from a conviction and sentence in a criminal case and from the denial of a motion for new trial pursuant to Utah R. Criminal P. 24(a). This Court has jurisdiction pursuant to Utah Code Ann. §§ 77-18a-1(1)(a) and (b).

STATEMENT OF ISSUES PRESENTED

1. Whether the presentation of new evidence including the admissions to the killings by the two main prosecution witnesses against appellant warrants a new trial. This issue was properly raised in a motion for new trial and memorandum in support of the motion filed after judgment. (R:1230-1232; 1170-1229.)

The denial of a motion for new trial on the grounds of newly discovered evidence is reviewed for an abuse of discretion, but any legal determinations made by the trial court as a basis for its denial of a new trial are reviewed for correctness. *State v Loose*, 2000 UT 11, at ¶8, 994 P.2d 1237. Constitutional violations are reviewed for harmless error. *Chapman v California*, 386 U.S. 18 (1967).

2. Whether the prosecution's failure to disclose exculpatory evidence at trial requires reversal and a new trial. This issue was properly raised below in the motion for new trial. (R:1230-1232; 1170-1229.) The denial of a motion for new trial on the grounds of newly discovered evidence is reviewed for an abuse of discretion, but any legal determinations made by the trial court as a basis for its denial of a new trial are reviewed for correctness. *State v Loose*, 2000 UT 11, at ¶8, 994 P.2d 1237. Constitutional violations are reviewed for harmless error. *Chapman v California*, 386 U.S. 18 (1967).

3. Whether the trial court erred in admitting appellant's purported admissions through the testimony of witnesses called by the prosecution to contradict its own witness who was forced to testify though a grant of immunity for the sole purpose of getting evidence before the jury which would not have otherwise been admissible.

This issue was raised in motions in limine during trial and in the motion for new trial. (R355-362; 488-495; 1170-1229.) "Although the admission or exclusion of evidence is a question of law, [this Court] review[s] a trial court's decision to admit or exclude specific evidence for an abuse of discretion." *State v Cruz-Meza*, 2003 UT 32, ¶8, 76 P.3d 1165. Constitutional violations are reviewed for harmless error. *Chapman v California*, 386 U.S. 18 (1967).

4. Whether the trial court erred in permitting, as prior consistent statements, the introduction of the testimony and evidence contained in the notes prepared by another witness which was used by the prosecution to bolster the testimony of a prosecution witness. This issue was raised in a motion in limine during trial and in the motion for new trial. (R473-474; 761-769; R1170.)

The standard of review is for an abuse of discretion. *State v Cruz-Meza, supra.*

5. Whether a jury instruction which did not properly advised the jury that the State had the burden to disprove the affirmative defense of compulsion violated appellant's constitutional rights and requires reversal of the convictions. This issue was raised in the motion for new trial. (R1230-1232; 1170-1229.) Since there was no objection during trial, this Court may grant relief is there is a manifest injustice in the instruction. U.C.R., Rule 19(c). Constitutional violations are reviewed for harmless error. *Chapman v California*, 386 U.S. 18 (1967).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following are set out in the addendum:

United States Constitution, Sixth and Fourteenth Amendments

Utah Constitution, Article I, Section 7.

Utah Rules of Evidence: 403, 607, and 801

STATEMENT OF FACTS

I. Course of Proceedings

Pinder was charged with eleven felony counts surrounding the murders of Food and Tanner.[1] After jury trial, he was convicted of all counts and the jury imposed a sentence of life with the possibility of parole on the murder counts.

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[1]The counts are as follows: (1) aggravated burglary; (2)and (3) aggravated kidnapping; (4) and (5) aggravated murder; (6) tampering with evidence; (7) residential burglary; (8) possession of explosive device; (9) and (10) desecration of dead body; and (11) tampering with evidence.

After judgment, Pinder filed a motion for new trial which was denied after evidentiary hearing. This timely appeal followed.

II. Introduction

John Pinder was convicted almost entirely on the testimony of two witnesses, Filo Ruiz and David Brunyer. Both are accomplices under the law, and their testimony is thus inherently suspect. New evidence reveals that both lied at trial, and both had the ultimate reason to lie in that they, not Pinder, committed the murders.

The prosecution's case was based on the theory that Pinder had an unreasonable hatred for the victims, June Flood and Rex Tanner, both having worked at the Pinder ranch. Tanner had been hurt and was not working at the time of the killings. Flood had done some accounting work for Pinder, but had quit work in July 1998. Flood lived in a small house near the ranch, and Tanner resided in a trailer about a mile from Flood. (R1773: 41.) Tanner was in the process of moving to Flood's house. Neither lived at the ranch when they were murdered. Depending on which prosecution witness was testifying, Pinder allegedly disliked the couple because he believed they lied and had stolen documents from him or because he believed Flood had set him up with a meth lab on his property.[2] According to the prosecution, this alleged hatred was so strong that Pinder purportedly solicited Ruiz's help in kidnapping the couple, shooting, them and then blowing up their bodies. (R1773: 17-25.)

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[2]Conflicting testimony was presented by the prosecution for motive. Ruiz testified that Pinder was angry with Flood because he believed she had set him up with a meth lab on his property. (R1777: 71.) However, other trial testimony pointed to Ruiz, not Flood and Tanner, as the supplier of drugs to the ranch workers. David Brunyer testified that Pinder was angry with the couple because they had stolen some important documents from him. (R1775: 71.) It was undisputed that Pinder had filed a police report against Flood. (R1774: 59.)

Because the prosecution had no physical evidence to support its theory that Pinder, not Ruiz, killed Flood and Tanner, the case rested on the testimony of part-time employee Ruiz, another part-time helper at the ranch, David Brunyer, and on the contested extrajudicial admissions allegedly made by Pinder to Barbara DeHart. (R1773: 21-23.)

Ruiz was charged as a co-defendant but entered into a plea bargain in exchange for his testimony against Pinder. Facing capital homicide charges, Ruiz eventually received a sentence which will result in his release by 2008. In the meantime he may be transferred to Mexico to serve the remainder of his sentence.[3] Brunyer was never charged in the case, and he denied before the jury that he was promised anything except moving expenses in exchange for his testimony, and he denied he had been granted immunity. (R1775: 41.) However, during the hearing on the motion for new trial, he admitted he told a defense investigator he had been promised $50,0000 by the State if Pinder was convicted.[4] He also said he was upset that the promise by the police had not been kept.

After trial, Pinder developed significant new evidence. This evidence, included Ruiz's confession to the killings, implicated Brunyer in the killings, and exculpated Pinder, and was

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[3]Ruiz did not agree to cooperate until his sentences were guaranteed to be run concurrently and until the prosecution agreed to facilitate a potential transfer to Mexico. When the judge imposed a $20,000 fine which prevented that transfer, the prosecution returned to court to seek a stay of the fine, which was granted. And when the parole board originally set his minimum date at twenty years, the prosecution wrote letters on his behalf, and his release date was cut in half. None of this information was presented to the jury when Ruiz testified against Pinder.

[4]Brunyer only admitted to this offer after first denying it at that hearing. When confronted with a tape of his admission of this offer, he acknowledged it saying that he was offered the money and that others had been present when the offer was made by the police. (R1758: 138-139.)

presented at the hearing for new trial. This new evidence included information about Ruiz's involvement in a prior homicide in the Uintah Basin, about his threats to other individuals, and about his connection to organized crime. Finally, new evidence demonstrated Brunyer's own participation in the murders, his false testimony at trial, and the State's failure to provide this evidence. Brunyer's family members and friends testified that Brunyer admitted his involvement in the actual murders and made statements that Pinder was not involved in the killings.

Despite this extensive new evidence, the trial judge improperly, and in contradiction to precedent from this Court, placed himself between Pinder and a jury of his peers, and denied the motion for new trial on the basis of the credibility of the evidence. The trial court failed to consider the full impact of all the new witnesses presented. In light of all the evidence, the trial court's decision incorrectly insulates the prosecution from its errors and denies Pinder the right to have all of the evidence presented to a jury for full consideration of his guilt or innocence. Due process of law and fundamental fairness as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Utah Constitution require that a new trial be ordered in this unusual case, where the very pillars of the case against Pinder have been destroyed at their base by evidence developed after trial. Justice requires nothing less than a new trial where a new jury panel can consider the new evidence, along with the old, to determine the validity of the charges against John Pinder.

This brief will outline the evidence at the trial and then the evidence presented during the motion for new trial. The brief will then address the legal basis for reversing the trial court's denial of the new trial motion. Finally, this brief will address the remaining legal claims

which, whether considered independently or cumulatively, require reversal of the convictions in this case.

III. Trial Testimony

During the last week of October 1998, June Flood and Rex Tanner were reported missing. Police were eventually informed of a site on the Pinder ranch which contained parts of human remains. The cause of death was difficult to determine because the remains had been partially destroyed by explosives. The medical examiner could determine that Tanner was shot by a medium caliber bullet from either a pistol or rifle.

A. The Killings According to Ruiz

According to Ruiz, on the night of October 25, 1998, Pinder shot and killed Flood and Tanner in Ruiz's presence. Ruiz claimed he had "never killed nobody." (R1777: 78.) Ruiz testified that he heard Pinder say "a couple of times, a few times" and then "over one hundred times" that Pinder wanted to kill them because Pinder believed Flood knew who had set him up "with the meth lab on the ranch." (R1777: 69-71.) But Ruiz also testified Pinder did not say why he wanted to kill them or that Pinder ever told Ruiz to kill them. (R1777: 72.)

Ruiz testified that on the night of the killings, Pinder asked Ruiz to go with him to have a "chat," and Ruiz agreed to go along without any further explanation. (R1777: 98.) They left the ranch house in Pinder's blue Dodge truck. Ruiz first testified that two guns were already in the truck, Pinder's 10 mm and the AK-47 that he had lent to Ruiz for use on the ranch. But Ruiz later testified that he had brought the AK-47 with him. (R1777: 107). Gary Potter, a defense investigator, stated that Ruiz had told him that Ruiz took his rifle into the house that night (R1784: 5-6.), and that is consistent with what Ruiz had told the police.

They arrived at Flood's house, Ruiz followed Pinder out of the truck, and they knocked on the door. Flood invited them in. (R1777: 100). Ruiz claimed to be unarmed but testified that Pinder had a baseball bat. (R1777: 100-101.) Ruiz also testified that he, Ruiz, had a bat when he entered the house. (R1777: 99, 101.) Ruiz testified that Pinder began arguing with the couple and ordered them to accompany him and Ruiz so they could talk, but the couple refused to leave the house. (R1777: 101.) Ruiz claimed that Pinder then struck Flood in the mouth with the bat and she started bleeding. Ruiz said Pinder hit Tanner on the leg with the baseball bat, and the couple then agreed to go with the men. (R1777: 102-104.) Before they left, Pinder allegedly grabbed a rifle from the couple's house. (R1777: 105-106.)

Ruiz testified that Pinder drove the truck to the Lake Canyon area while Ruiz sat in the back seat passenger side with Flood next to him and Tanner in the front seat. Ruiz stated that once there, Ruiz, Pinder, and the couple got out of the truck and started walking towards the back of the truck. Both Pinder and Ruiz were armed with their guns. (R1777: 108-110.) Ruiz testified that before he got to the back of the truck, he heard a gun fire and then no longer saw Flood standing. Ruiz testified that Pinder then approached Ruiz and shot Tanner, who was standing behind Ruiz. Pinder threatened to shoot Ruiz but did not after Ruiz pointed his rifle at Pinder and said, "Go." (R1777: 110.) Ruiz testified that Pinder told him he would shoot Tanner in the head and then Ruiz heard another shot. The state medical examiner found no shots to Tanner's head.[5]

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[5]The medical examiner testified that the cause of Tanner's death was gunshots from a medium caliber bullet. He could not definitely identify the type of weapon used and indicated it could have been a pistol or a rifle. (R1773: 101-104.)

According to Ruiz, Pinder then grabbed Flood and started pulling her body toward the bushes. (R1777: 110.) Ruiz claimed Pinder then returned and grabbed Rex, telling Ruiz, "Help me." Ruiz testified that he could not move at first but then he grabbed a leg and helped Pinder pull Tanner's body next to Flood's body. (R1777: 110-111.) Other than being present when these events took place, Ruiz claimed he never threatened the couple or assisted Pinder in any way with the homicides. Even though he admitted to having a bat and rifle in the house during the abduction and his AK-47 assault rifle at the site where Ruiz said the pair was murdered,[6] Ruiz claimed he was afraid that Pinder would kill him and that was the only reason he helped Pinder. (R1778: 55-59.)

B. The Destruction of Evidence According to Ruiz

Ruiz testified that he and Pinder returned to the ranch, but he did not know who drove the truck on the return. (R1778: 20.) They then went to the caves where the ranch explosives were kept to pick up bags of ammonia nitrate[7] and dynamite. (R1778: 21.) They returned to the bodies and placed five to six bags, almost three hundred pounds, on top of and next to the bodies along with the rifle Pinder had taken from the couple's house. Pinder put down a "small piece of aluminum and a cord" and set off the explosion. (R1778: 22-23.) Ruiz stated

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[6]No 10 mm casings were found near the bodies, but three 7.62 x 39 shell casings were collected from the alleged murder scene.

[7]Ruiz described the bags of ammonia nitrate as bags containing "small white balls" and claimed to have no knowledge of explosives, "[s]ince I've never been involved with those things . . . ." (R1778: 22.) Yet, Sergeant Wally Hendricks testified that during the search of the ranch properties, the police found a vehicle that belonged to Ruiz which contained boxes containing a firearm, blasting caps, fuses, electrical cord and some yellow wire. The keys to the car were located in Ruiz's bedroom. These items were sent to the bomb squad for disposal. (R1781:42-44, 61.)

that he drove the truck back to the ranch and heard the explosion after driving for about a minute. When they returned home, Ruiz claimed that Pinder instructed him to remove his clothing and give it to Pinder, who then took Ruiz's clothing along with his own and burned the items next to a diesel tank at the ranch. (R1778: 23-24.) Ruiz testified that he did not sleep that night because he was afraid Pinder would come kill him in his room. (R1778: 24.)

Despite Ruiz's alleged extreme fear of Pinder, the next day Ruiz left the ranch with bookkeeper Joe Wallen and spent all day in court in Vernal. (R1778: 25-27.) Instead of fleeing, Ruiz returned to the ranch after court and found David and Shirley Brunyer, Barbara DeHart, and Wallen at the house. (R1778: 27.) Pinder, DeHart, and Ruiz were invited to Brunyers' for dinner that night. (R1778: 27; R1775: 61.) Before going, they went to the ranch cemetery where Pinder and Ruiz grabbed some black bags that Pinder said contained parts of Tanner. (R1778: 27-28.) They put the bags in the back of the truck and returned to the ranch where they burned the bags and their contents with diesel fuel in a barrel at the ranch dump. They then continued on to the Brunyers' for dinner. (R1778: 28.) Ruiz testified that after dinner, Pinder, Ruiz and DeHart went to the lake to look for more body parts. DeHart stayed in the truck while Ruiz and Pinder searched for body parts. (R1778: 30-32.) Ruiz stated that he found a body part that belonged to Flood and that Pinder helped him put the part in a garbage bag, which was placed in the back of the truck. They took the collected body parts and the burn barrel they used earlier that night to a different location, where they "burned the other body parts." (R1778: 33.) Explosives were used to blow up the burnt contents. (R1778: 31-33.)

About ten to fifteen minutes after the fuse was lit, and after returning to the ranch house, Ruiz said he heard the second explosion that shook the house: "I heard the explosion go boom." (R1778: 35.) Ruiz did not tell police about the second explosion until after he signed his plea agreement with law enforcement and pled guilty. Ruiz said that the reason he did not tell the police about this second explosion was because he was "scared." (R1778: 36.) Ruiz explained the presence of Flood's blood on the cuff of his pants by claiming that he wore the pants "one of the days [he] went to pick up the parts." (R1778: 37-38.)

Also as part of their clean up efforts, Ruiz testified that Pinder told Ruiz to tell David Brunyer to go clean Flood's house. (R1778: 38-50.) Ruiz then found Brunyer and told him to go back to the ranch so Ruiz could go with him. Brunyer drove to the house in his own truck; and once there, Ruiz and Brunyer cleaned fingerprints and blood by the phone, and then took the phone and burned it in a barrel at the ranch. (R1778: 40.) Brunyer then picked up Pinder and drove to Lake Canyon; Ruiz brought fuel for the Caterpillar which Pinder operated while Ruiz and Brunyer picked up body parts. Ruiz told Pinder where to scrape with the Cat. (R1781: 28-29.) Brunyer burned the body parts, and on the way back from the canyon Ruiz and Brunyer threw the burned remains in the river, while Pinder stayed behind and took the Cat to another place where he had been looking for gold. (R1778: 48-50.)

Ruiz testified that on Thursday, Pinder and DeHart left for Idaho, where Pinder had been moving before the killings. (R1778: 52.) On Friday night, Ruiz and his seventeen-year-old girlfriend Mandy were stopped and questioned by police while driving by the Lake Canyon blast site. While driving back down the canyon with Mandy in the white Ford truck, Ruiz was stopped and arrested. (R1778: 23.) Ruiz testified that he was going there to see if anyone was

fishing at the lake, which adjoined the blast site. (R1778: 52-53.) Ruiz testified that his purpose in going to the lake at night was to discourage any fishermen, because Pinder did not like anyone fishing the lake. When Ruiz was arrested, police found in the back of Ruiz's white Ford truck a box of black garbage bags, Ruiz's AK-47 (SKS) rifle, and a blue bag containing clips of 7.62 x 39 mm ammunition for Ruiz's rifle. (R1778:53; State's Exs. 58 and 59.)

C. Filomeno Ruiz's Background

On the night of October 30, 1998, Ruiz was arrested while returning to the remote site where the bodies were located. Although at that time he denied any knowledge of the killings, Ruiz testified at trial that he was present when Pinder shot Flood and Tanner. (R1777: 56-58.) Ruiz testified he worked for Pinder as a ranch hand on the Pinder ranch.[8] (R1777: 60-61.). Ruiz admitted to selling drugs before going to work for John, but claimed to have stopped that illegal activity prior to the events of the case. (R1778: 29, 111.) He also stated, however, that he continued to use drugs, taking crystal meth and smoking marijuana with David Brunyer on many occasions, something that Brunyer said was a lie. (Cf, R1778: 29; R1775: 121.)

Testimony was presented that Ruiz was a dealer of large quantities of methamphetamine in 1997 and was the target of a drug and weapons smuggling investigation by United States Customs. In fact, Pinder was assisting in this investigation as an undercover operative. In the course of conducting his drug business, Ruiz made threats to kill people who crossed him.

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[8]Ruiz testified that Pinder agreed to pay him $2,000 a month to feed Pinder's pet lion, care for the ostriches and deliver papers. (R1777: 60-61.) According to Ruiz, Pinder paid him this salary only one month, even though Ruiz "worked" for Pinder for 3 or 4 months. Ruiz also testified that although he had a house in Duchesne where his wife and two children lived, he often stayed at the Pinder ranch, living in the main ranch house with his girlfriend, Mandy. (R1777: 62-64; R1778: 96.) When he stayed at the ranch, he drove a red Dodge truck belonging to Pinder. (R1777: 65.)

Those who knew Ruiz were afraid of him because of his violent temper and the fact that he was always armed with concealed weapons.

Michael Sweat, a former drug dealer who was given drugs to sell for Ruiz, testified that in early 1997 Ruiz threatened to kill Sweat's chickens, dogs, children and wife while making Sweat watch, and then kill Sweat if Sweat talked to police about Ruiz's drug involvement. (R1783: 30-37.) Ruiz was always armed with a concealed weapon, and Sweat believed Ruiz's threat, which was made after Sweat was arrested by the Uintah County Sheriffs with two ounces of Ruiz's methamphetamine. Ruiz was concerned that Sweat might tell the police that the drugs belonged to Ruiz.

Then in October 1997, Sweat met Ruiz near the Pinder ranch. Ruiz had an Uzi and again threatened to kill Sweat if he talked to police. (R1783: 36-37.) Pinder diffused the situation, trying to get Ruiz to cooperate with the Customs investigator.

Scott Johnson testified that he lived with John's sister for four years and knew Ruiz. In August or September 1998, Ruiz bragged that he was learning how to use explosives and that he liked the power it gave him and "the big boom" it made. (R1783: 40-42.)

Ranch-hand Bud Court, a good friend of Tanner's, testified that Ruiz was considered a leader, not a follower, and that Ruiz admitted to Court that he had killed a person in the past. (R1783: 52-59.) Moreover, Ruiz had commented that if he ever killed anybody, he would use explosives "to blow up the people to get rid of the bodies." (R1783: 58.) Court and Pinder were present and told Ruiz it would not work, as they had unsuccessfully tried to blow up a number of dead cattle with explosives to remove a safety and health hazard on the ranch. (Ibid.)

D. Ruiz's Conflicting Statements

Ruiz's "version" of how Flood and Tanner died was called into question not only because Ruiz was not the scared, simple, peace-loving individual he painted himself to be before the jury, but also because his testimony was, on more than one occasion, simply unbelievable. Ruiz gave police several conflicting statements after his arrest. At trial he acknowledged that he initially denied any knowledge of or involvement in the deaths until after being told repeatedly by the police to blame it on Pinder. (R1779: 17-35.)

Ruiz admitted that he had numerous opportunities to get away from Pinder and to go to the police after the killings, as he had possession of both the white Ford and the red Dodge trucks. (R1777: 65.) But Ruiz claimed that he did neither because he was afraid for his wife and children and "didn't want to say anything to anybody until [he] was sure that [his] family was in a safe place." (R1779: 13-17.) Yet, in contradicting testimony Ruiz acknowledged that his wife and children had moved out of the area prior to the killings and he did not know where they had moved to. (R1779: 15-16.) However, he did not express any concern for the safety of his girlfriend who was at the ranch with him. (R1779: 37.) He admitted being with Mandy the days after the killings and when he was arrested. Even after Pinder had left for Idaho on that Thursday, Ruiz remained in possession of the ranch truck and had access to a telephone and money; nevertheless, Ruiz did not contact the police until he was arrested while in the Lake Canyon area with evidence of the crime still in his possession. (R1779: 36-42.)

When confronted with these facts, Ruiz claimed that he could not leave the ranch because he did not have a valid license, did not have a car, the truck "wasn't mine," and he did not want to take anything that did not belong to him, even though he had decided on his own to

drive the red truck to Salt Lake City. (R1779: 39-40, 45.) Ruiz's Audi held guns, blasting caps, fuse, and electrical cord when it was found at the ranch . (R1781: 42-44.)

E. David Brunyer's Account

David Brunyer testified that he worked part-time at the Pinder ranch. Pinder advanced Brunyer approximately $1,300 for a court fine Brunyer needed to pay, and in return Brunyer agreed to help out around the ranch. (R1775: 46-47.) Brunyer, a convicted felon, admitted to once using drugs, but claimed to have stopped by the time he came to work for Pinder. (R1775: 37-41.) On cross-examination, however, Brunyer admitted that despite his testimony on direct that he had stopped using drugs, he used methamphetamine on one occasion with Pinder's sister when he was supposed to be clean. He denied ever using drugs with Ruiz, even though Ruiz testified that they did so "many times." (R1775: 120-121, 123; R1778: 29.) Although married, Brunyer was having an affair with Pinder's sister, and the two were using a lot of methamphetamine together. Brunyer denied the affair. However, Brunyer's wife was aware of the affair and drug use, having confided this to her friend (R1783: 77-79.); she had asked to move into a trailer owned by Ruiz to get away from her husband's drug use and deceitful behavior. (R1781: 91-95.)

Larry Rasmussen testified that shortly before the killings he saw Brunyer shooting his rifle and bow and arrow at non-existent federal agents and possibly shooting at the trailer where Tanner lived. (R1782: 59-64.) Defense investigator Potter went to the Tanner trailer with Duchesne Sheriff Sgt. Hendricks before trial and took pictures of bullet holes in the trailer but did no further investigating about the motive for the trailer shooting. (R1784: 70, 72.)

Brunyer testified that he learned of the victims' deaths two days after they were killed. Brunyer met Ruiz while driving back to the ranch, and Ruiz told him to park the truck and go with him to wipe down Flood's house for fingerprints. Brunyer testified that Ruiz told him that Pinder had instructed Brunyer to take his truck, but Ruiz testified it was Brunyer's order to take this vehicle. He went with Ruiz to the house. (R1775: 66.) Brunyer poured alcohol on paper towels and a bed sheet Ruiz used to wipe down the door and the phone, but denied wiping anything himself. Upon leaving, Ruiz took the phone and the phone plug with him, and a few minutes later burned these items back at the ranch along with some garbage. (R1775: 68-69.)

Brunyer also claimed that Pinder made incriminating statements about the killings when he and Ruiz returned to the ranch after cleaning the house. Brunyer testified that he overhead Pinder ask Ruiz, "Did you get it all?" and "What about the blood?" And in response to Brunyer's comment that the house smelled like shit, Brunyer testified that Pinder said, "That's because Rex shit his pants when I shot him."[9] (R1775: 70.) However, according to Ruiz's testimony, Tanner was not shot in the house, but at the Lake Canyon site.

Brunyer testified that Pinder did the killings because he said the victims were "liars, thieves and maggots, and now they're vaporized and . . . no one will miss them anyway." (R1775: 71.) Brunyer also testified that Pinder accused them of lying and of stealing documents from his ranch house and that Pinder loved his ranch and would do anything for it. (Ibid.)

Brunyer later drove Pinder to Lake Canyon while Ruiz drove in the white fuel truck. Once there, Pinder drove the Cat while Ruiz told Pinder where to scrape, and Brunyer and Ruiz

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[9]Yet, Ruiz contradicted this testimony and said that he did not recall any such conversation. (R1778: 44-45.)

cleaned up body parts that were strewn around the area. Brunyer and Ruiz used diesel fuel to burn the tissue from the body parts and then threw the bones into the river, while Pinder remained at the site. (R1775: 71-78). Brunyer claimed that he helped because he was fearful for his life and family, as he had seen both men act violently, especially Ruiz. (R1775: 97-100.)

Brunyer testified that when he returned to his trailer, he told his sixteen-year-old daughter Andrea to write down the events as he explained them to her and to save her notes to give to police in the event that something happened to him. (R1775: 79-80.) Over objection, Andrea Brunyer was called by the prosecution to bolster Brunyer's testimony. She was permitted to testify about her father's statements to her and to authenticate her re-written account of her father's statements with her own comments and words, which was admitted into evidence over objection. (R1777: 10-11.) Andrea testified that she burned her original notes but found some of them two years later. (R1777: 8-9, 16-18.)

In contrast to Ruiz's testimony that Ruiz was a non-violent man, Brunyer described an occasion when Ruiz pistol-whipped and threatened Berry Johnson and then did the same to Tanner and Flood.[10] Ruiz always carried a gun, and Brunyer heard rumors that Ruiz was a member of the Mexican Mafia. (R1775: 97, 101.) He personally watched Ruiz pistol-whip Pinder's stepson (R1775: 129), beat up Ruiz's wife, assault Mandy (R1775: 97-100), and threaten and hit Flood. (R1775: 148.) Additionally, Brunyer testified that he overheard Ruiz tell Pinder

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[10]Brunyer recalled that Ruiz pulled out a 10-millimeter gun, the same weapon Ruiz claimed Pinder used in the murders, stuck it to Berry's head, pushed him down almost off the kitchen chair and told him, "You've stolen John's explosives and some documents, and I'm going to kill you." (R1775: 50.) Ruiz then pulled the gun on Flood and Tanner, pointed it at their faces and appeared to hit Flood with the gun. (R1775: 50-51, 147-148.) This happened approximately a week and a half before the killings.

he wanted to kill Flood and Tanner after Ruiz had assaulted Flood. (R1775: 148-149.) Brunyer told police that Ruiz was "itching" to kill someone as he had heard Ruiz telling Pinder that he wanted to kill three different ranch hands, but Pinder always dissuaded Ruiz from any violence. (R1775: 149-150, 156-157.) Ruiz had threatened Brunyer with a gun prior to the murders, and Brunyer told Pinder he was afraid of Ruiz but continued to work with the man. (R1775: 100, 151.)

Like Ruiz, Brunyer admitted that despite his purported "fear" of Pinder, he had many occasions to leave the ranch but never did. He explained his decision not to flee by claiming that he was fearful for his family and his own life. He testified that after confessing to his daughter he took his family to stay with friends who lived outside Heber City, but admitted that he stayed at his trailer and did not go to police. (R1775: 79-82.) Instead, he hung around the ranch for several days and helped Pinder and DeHart prepare to leave for Idaho on the Thursday following the killings. (R1775: 81.) After the couple had left, on Friday morning, instead of going to police, Brunyer went to ranch house number two to cut firewood near Tanner's trailer. (R1775: 82.) While he was there, law enforcement officers arrived inquiring whether anyone had seen Flood or Tanner, as their families were unable to locate them. (R1775: 82-83.) Brunyer denied knowing anything about the couple's whereabouts. Later, after leaving, he called the police on his cell phone. (R1775: 83-84.)

Despite Brunyer's acknowledged assistance with destroying the bodies and evidence, he was never charged with any crime. (R1775:132-135.) Instead, he was given $1,500 to relocate

and testify against Pinder.[11] Additionally, he admitted trying to exploit his involvement as a prosecuting witness to get out of criminal charges he picked up after the killings. (R1775: 134-141.)

Ranch hands Joseph and Christie Andrews testified that Brunyer bragged to them *before* the killings that the FBI had approached Brunyer to help the FBI "get" Pinder. (R1783: 69-72, 79.) After the killings, Brunyer told the couple that he would be "sitting pretty" if Pinder was convicted. (R1783: 71-72, 79-80.)

On cross-examination, Brunyer himself admitted that, in September 1998 before the killings, he was approached by Michael Hendricks, a middleman for FBI agents. Hendricks wanted his assistance in taking John down, as the FBI had been trying to get John for a long time. Brunyer admitted he told the Andrews about this contact but denied telling them that he would get money for the conviction of Pinder in the Flood and Tanner murders. (R1775: 141-144.)

Scott Johnson testified that Brunyer knew how to use explosives and bragged about using them extensively in the past. Brunyer also claimed to be a mercenary. (R1783: 42-43.)

F. The Testimony of Jailhouse Informant Newly Welch

In addition to calling Ruiz and Brunyer, the prosecution tried to bolster its case by relying on the testimony of jailhouse snitch Newly Welch, a four time convicted felon on theft, burglary, and theft by deception charges. Welch testified that he met Pinder in the Summit County jail and had known him for only a few days, but that through the course of several

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[11]Brunyer denied receiving any other payments for his testimony. However, after the trial he told others that he had been offered money to testify. See, infra., pp. 29-34.

jailhouse conversations Pinder volunteered to Welch that he and Ruiz shot and killed Tanner and Flood and then blew up their bodies. (R1780: 9-10.) Welch testified that Pinder said, "We shot them." (R1780: 12.) Welch told the police that Pinder admitted using a sawed-off shotgun to commit the murders. (R1780: 30-33.) However, the medical examiner testified the cause of death was a medium caliber bullet from a pistol or rifle, not a shotgun.

Welch claimed that Pinder said he did not bury the bodies because he did not think about it as he "was high and stuff" at the time. (R1780: 13.) Welch also claimed that he asked Pinder what it was like to kill someone and Pinder replied, "There is no bigger rush, especially when you know you're going to get away with it." (R1780: 13-15.) This statement was allegedly made by Pinder, while in custody awaiting trial on capital homicide charges after arrest for these very killings. Welch admitted that he had access to television while in jail and that he had seen a broadcast on the case about two months before Pinder arrived at the jail. (R1780: 11.)

On cross-examination Welch admitted he had access on one occasion to Pinder's hand written documents about the case.[12] (R1780: 17-19.) Welch also admitted that he was up for a parole hearing soon and that he planned to inform the parole board of his testimony in this case with the hope that it would help him get out of prison early. (R1780: 23-24.) He also admitted that he had lied a number of times in his life, including to prison authorities, and that he made false statements to police about what Pinder said. (R1780: 21-34.)

Former Summit County jail inmate John White testified that he met Newly Welch in prison in 1997. Welch had to be moved into protective custody at that time because Welch had

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[12]Department of Corrections Officer Michael Ruffner testified on cross-examination that during his contact with Welch about Pinder's alleged jailhouse statements, Welch told Ruffner that he had access to Pinder's notes. (R1780: 46.)

snitched on someone and his life was in danger. (R1782: 70-75.) They met again in the Summit County jail in 1999 when White was in custody on a parole violation. Welch told him that he was getting out soon because he was going to testify against a "guy" facing murder charges. Welch said he was going to testify that the guy confessed to him. White asked him if the confession had really occurred, and Welch shook his head, "No." (R1782: 74.)

Summit County Correctional officer Jill Anderson described Welch as a manipulative inmate who always wanted attention and who lied to get what he needed. (R1783: 5-9.) She also testified that Pinder's interactions with other inmates was almost nonexistent. Anderson testified that Pinder "pretty much kept to himself, kept in his room. Most of the time I saw him it was to make phone calls. That's about it." (R1783: 7.)

G. The Purported Admissions of John Pinder

To supplement the accomplice testimony of Ruiz and Brunyer and the jailhouse snitch testimony, the prosecution presented indirect evidence of admissions allegedly made by Pinder to his girlfriend Barbara DeHart. This evidence did not come in by way of DeHart's testimony, who denied these admissions were made. Rather, the prosecution called DeHart's daughter, son-in-law, and father, who testified that DeHart, *not* Pinder, made extra-judicial statements that incriminated Pinder in the murders.

In order to have DeHart testify, the prosecution granted her immunity and subpoenaed her to deny that Pinder made any admissions to her. (R1780: 64-152.) The prosecution knew DeHart would deny the alleged admissions, as she had consistently done so in the past.

Melissa Cowles, DeHart's daughter, testified that her mother made three separate statements about Pinder's alleged conversations: 1) "Filo had just been arrested at the ranch and

they thought he had murdered – had murdered somebody on the ranch," and she and Pinder might have to go back to Utah to make statements (R1781: 103.); 2) Pinder admitted to the killings, and they had gone to the carwash to clean up the evidence throwing out bloody hair and scalp, burning or throwing away bloody clothes and throwing the murder weapon off a bridge into the river (R1781: 105-107.); and 3) Pinder was innocent and Ruiz and Brunyer had murdered the ranch-hand and his girlfriend and that Ruiz had planted evidence in the truck. (R1781: 107-108.) Cowles testified that she told the police she wasn't sure any of this was true and she did not know which statement to believe, because her mother did not always tell the truth and had a tendency to state her assumptions as truth even though they might be false. (R1781: 112-114.)

Additionally, Cowles testified that on Monday, October 26, 1998, she spoke to her mother on the phone and her mother said that "John had been out all night" with Ruiz and Brunyer, and she had made a nice dinner and Pinder had not showed up. (R1781: 101-102.) DeHart denied that she ever made these statements, and neither Ruiz nor Brunyer testified they were out all night with Pinder. In fact, Ruiz testified that he ate with Pinder and DeHart that night. (R1778: 21.)

In addition to Cowles' testimony about Pinder's alleged admissions to DeHart, DeHart's father Bernie Knapp, testified that Barbara called him in a stressed and excited state and told him she helped clean blood and mess out of Pinder's truck and they were going to dispose of a gun. She said the victims were two druggies who were shot and their bodies blown up. (R1781: 140-141.) Sergeant Hendricks examined the truck and testified that it was cluttered and not very clean. (R1781: 51-53.)

Damion Cowles testified that he overheard DeHart tell his wife Melissa that DeHart found a "bloody scalp or some hair in the back of Pinder's truck," that she had "found some clothes that had blood on them and that they had burned them," and that they were going to throw Pinder's gun over a bridge out by where they lived. (R1781: 135-136.)

H. Other Defense Testimony

Pinder testified that he did not kill Tanner or Flood, but admitted that after being told by Ruiz of their deaths, he helped Ruiz and Brunyer in disposing of the blown up remains of the bodies which were scattered around the blast site on the ranch property. Pinder theorized that Ruiz killed the couple for drug-related reasons because Floor and Tanner had knowledge of Ruiz's drug activities and because Ruiz was an unpredictable, violent man with deep ties to Mexican-based drug smuggling operations. Pinder, who had many years of previous experience contracting with and assisting the federal agencies in undercover investigations of large drug-smuggling operations (R1783: 12-13), testified that he participated in the clean up because he was threatened by Ruiz, who also made threats against Pinder's family, and because he was afraid of Ruiz and his ties with the Mexican Mafia.

Before the killings, Pinder himself had become drug dependent and was using methamphetamine with Ruiz, but had quit using drugs a couple of months before the killings. Pinder was moving to Idaho to get away from drugs and the people he had been associating with. (R1784: 49.) Although Pinder was afraid of Ruiz, he kept a close association with him as Ruiz was the target of an ongoing investigation by United States Customs. He also kept him around the ranch because Ruiz had been supplying him with drugs in the past.

Joseph Wallen testified that Ruiz had access to everything on the Pinder ranch, including the ranch vehicles and guns, but Wallen did not understand why because Ruiz did little work on the ranch and was always with his girlfriend. (R1783: 84-85.)

U.S. Customs Service Agent Tom D'Leon testified that Pinder assisted him successfully as an informant in the early 1990's. (R1783: 12-13.) In 1997, Pinder brought him information about Ruiz and Dave Antillon being involved in drug dealing. As a result of this information, D'Leon opened an investigation. (R1783: 14-15.) At a later point, Pinder brought Ruiz to talk with D'Leon about possibly assisting in the investigation. Ruiz did talk with D'Leon about drugs and police in the Duchesne area. (R1783: 17-18, 22-23.)

IV. Motion for New Trial

Following the jury's verdict, a motion for new trial was filed challenging the State's failure to disclose exculpatory evidence and presenting new witnesses and testimony which warranted retrial. The suppressed evidence and/or newly discovered evidence presented at the hearing on the motion for new trial seriously undermined the testimony of the State's two accomplice witnesses, Ruiz and Brunyer.

Evidence was presented that both Ruiz and Brunyer had admitted their own involvement in the killings to others, including Brunyer's own relatives. These witnesses testified that Ruiz and Brunyer admitted that Pinder was not involved in the murders.

New evidence was introduced that severely undermined Ruiz's trial testimony that Pinder killed Tanner and Flood, that Ruiz was never involved with any gang or organization of drug dealers, and that he had never been involved in any prior killing. This evidence was in the

possession of the State prior to trial,[13] but the State failed to disclose this exculpatory evidence to the defense either before or after Ruiz testified.

A. Ruiz's Admissions

Joey Silva testified that he had been in jail in Duchesne County in 1999 at the same time Ruiz was there. (R1759: 7-8.) Silva was able to pick Ruiz out of a photographic lineup. (R1759: 101-102.) Silva explained that he met Ruiz during a Fourth of July picnic, and Ruiz told Silva about the Pinder ranch murders during the hours they were together that day.[14] (R1759: 12.) Silva also spoke with Ruiz on other occasions. (R1759: 27.) Ruiz told Silva that the "white guy," the one that went to the police, was the one with Ruiz when Ruiz killed the man and the woman. Ruiz further stated to Silva that Pinder was not present or involved in the killings, but that Pinder helped dispose of the bodies. (R1759: 8-10.) Ruiz said he killed the two people because they had stolen a large amount of methamphetamine from him. (R1759: 9.) Ruiz told Silva that he and Brunyer had gone to the house to confront the couple about the stolen drugs because people from Mexico were going to kill Ruiz if he did not find the drugs. (R1759: 9-10.) During the confrontation, all four went to the lake where the couple had hidden

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[13]For example, Kenneth Wallentine was the chief deputy prosecuting attorney for Uintah County and was involved as a Special Prosecutor for Duchesne County in preparing the warrants in this case. He testified that he assisted in the prosecution of Gerardo Perez, who was charged with two other men for the kidnap and murder of Todd Skidmore. (R1757: 27-28.) Wallentine testified that he was asked by the local prosecutor to take over the prosecution of Perez and the two other defendants because of the seriousness of the case, and admitted that in his prosecutorial capacity he reviewed the police reports and the FBI reports of the Skidmore homicide investigation, none of which had been provided to the Pinder defense before trial. He was aware that Ruiz was involved in the case at some level. (R1757: 25-72.)

[14]Ruiz also admitted that he had seen Silva in jail and that there was a picnic on July Fourth, but denied that he had made any incriminating admissions to Silva. (R1759: 49-50.)

the drugs. After Ruiz retrieved the buried drugs, Ruiz told Silva that the female became hysterical, screaming and crying out of fear, so he shot her. Ruiz told Silva he had to kill the man because he was a witness. (R1759: 9-11.) Ruiz also told Silva that he had killed people before (R1759: 12.) and admitted that he felt kind of bad for fingering Pinder with the murders and that Pinder had tried to get Ruiz to become an informant and work with law enforcement.[15] (R1759: 11.)

Although the State presented a number of witnesses from the Department of Corrections, who testified that in their opinion Silva was not credible, Silva's prison file, which was placed in evidence under seal, contained numerous references to the reliable confidential information Silva had provided from 1995 to the present. His information was often corroborated and led to arrests and convictions. For example, in 2002, Kevin Pepper, an investigator for the Department of Corrections Law Enforcement Bureau, indicated in a memo that Silva had provided "proven reliable" and "substantiated" information to the government. (R1758: 97-100.) Pepper paid Silva on two occasions for information and arranged for Silva to work with the United States Drug Enforcement Agency. (R1758: 91-96.) In Pepper's closing evaluation of Silva in July 2002, he described his supply of information as "excellent" and that because of his information several criminal cases had been completed successfully. (R1758: 101, 105.) Yet, at the hearing, Pepper testified that in his opinion Silva was not "credible" and denied making the entries. (R1758: 97-98.)

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[15]Silva first disclosed this information to trial counsel after the completion of trial in August 2000. At that time, Silva told Gary Potter that he was concerned for his safety and would not testify unless his safety could be assured. (R1758: 160-161.)

DEA agent Mark Webb testified that Silva provided credible information regarding ongoing investigations, including one which led to an arrest in March 2002. Webb also stated that he believed Silva was truthful when it profited him in some way. (R1759: 88.) Silva was paid for his work with the DEA, and the agency paid for his housing upon his release from prison in 2002. (R1759: 92.)

B. Brunyer's Admissions

Two witnesses provided new testimony and evidence that David Brunyer made inculpatory admissions to them that implicated him and Ruiz in the actual murders. These witnesses and the information they possessed were not known to trial counsel before the conclusion of trial and could not have been discovered before trial, as Brunyer's admissions were not made until after the trial.

Kristy Barnes testified that she was living in Duchesne in 2001, after the Pinder trial. She was the girlfriend of Robert Brunyer, David Brunyer's brother, and stayed with him on his property near David Brunyer's house. (R1758: 10-12.) While Barnes was in Duchesne County, she visited and socialized with David on numerous occasions. During many of these times, David admitted to her that he had been present when Ruiz shot and killed Flood and Tanner. David also admitted to Barnes that Pinder had not participated and had not been present during the killings. (R1758: 12-14.) Barnes also stated that David told her that he was paid $22,000 by Duchesne County for his testimony against Pinder. (R1758: 15.) David also threatened Barnes numerous times to keep her quiet about his statements. (R1758: 15-16, 25.)

Brunyer's older brother Robert Brunyer testified that in the fall of 2002 he spoke with David on several occasions about the murders, and David confided in him about David's

involvement and participation in the actual killings. Robert then spoke several times with his mother and other family members about whether he should come forward with the confession his brother had given him. Brunyers's sister, Leann Hill, as well as their mother, advised Robert to tell the truth because an innocent man may have been wrongfully prosecuted and convicted. Robert came forward because he "kind of figured there was a guy sitting in prison for life, and as far as [he was] concerned he [Pinder] didn't pull the trigger according to what [his] brother told [him]." (R1758: 32-33.) Shortly after these discussions, Robert called Pinder's attorney and informed him that David told Robert that he, not Pinder, had been present at the time of the killings, that Ruiz shot both victims, and that Pinder was not present and was away at the time of the killings. (R1758: 34-40.)

David told Robert that Pinder came home the morning after the killings, and Pinder, Ruiz and Brunyer began to try to hide body parts, that it was David's idea to use explosives to destroy the bodies, and that David falsely implicated Pinder because Ruiz had threatened to kill David and his family. (R1758: 37-38, 69.) David told Robert that he and Ruiz panicked after the murders and began to clean up the evidence. After blowing up the bodies, they got the tractor to try to clean up the scene. (R1758: 51-52, 57.)

Robert testified that he signed a truthful affidavit stating that Brunyer told him that Pinder was not present at the time of the killings and that Brunyer had been present and witnessed Ruiz shooting both Flood and Tanner.[16] (R1758: 70-71.) David told Robert that he

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[16]In the fall of 2001, Robert was arrested as the result of David informing police about Robert's illegal activity. Robert denied that he was testifying to get revenge on David for this. Indeed while Robert was in jail following his arrest, when he knew that David had been responsible for his arrest, Robert still lied to Pinder's investigator to protect David. (R1758: 31-32.)

had injected Tanner with a lion tranquilizer and methamphetamine. (R1758: 55.) Tanner's body tested positive for amphetamine, and no test for the tranquilizer was conducted. (R1774: 118.)

Brunyer's sister Leann Hill confirmed that her brother Robert spoke with her for about an hour by telephone in mid-November 2002. Robert told her he was torn about whether he should come forward with David's confessions of being present with Ruiz when Ruiz shot Flood and Tanner. Robert wanted her advice "because he had been very upset and said he was praying a lot about it." (R1758: 75.) Leann told Robert that he should come forward and tell the truth because it was the right thing to do even if it meant that David might be incriminated for his involvement in the crimes. (R1758: 78.)

Leann testified that she believed Robert was telling the truth and that David was not credible. (R1758: 73-80.) Robert told her he was not doing this for retaliation because he was upset with David. (R1758: 79.) Leann, a nurse practitioner, had never been involved with the law before and had no reason to lie or misstate the truth.

Leann's husband, James Hill, a post-certified correctional officer for the State of Utah Department of Corrections, testified that his wife was Brunyer's sister, and that he had known David Brunyer for the duration of his twelve year marriage with Leann. Hill called the Duchesne County Sheriff's Office shortly after he read about the murders in November 1998 to report that he believed that his brother-in-law David Brunyer might be involved in the murders and that David would "lie to save his own neck to keep himself out of jail." Hill also told the officer that David was a known drug user, a liar, and a very dangerous person. (R1757: 91-95.) He related his opinion that Brunyer was not a credible witness, had been in possession of

explosives, and had threatened others before the murders. (R1757: 94-95.) Hill informed the officer that Hill was a corrections officer and he did not want Brunyer to know that he had called because he was scared of Brunyer. (R1757: 97.)

Shortly after Hill made that call, he received a threatening voice mail message from Brunyer, telling him to watch his back and not to get involved in this case. (R1757: 95-96.) While no officer admitted informing Brunyer that Hill had called, David admitted during his testimony, contrary to Hill's specific request to remain anonymous, that he was told about Hill's call by one of the deputy sheriffs[17] and admitted that he called Hill leaving a voice mail message, but he denied he had threatened him. (R1758: 142-143.) Brunyer said he told Hill to "leave things alone." (R1758: 143.)

Hill made a tape of the threatening message and gave it to a government police officer. (R1757: 97-98.) He could not recall the person to whom he provided the tape, and neither the tape nor its existence (or any report about the call) was ever disclosed to trial counsel. Hill also contacted trial counsel's office shortly before the trial, but was unwilling to testify because he was afraid of Brunyer. (R1757: 101-102.)

Christine Moellmer testified by stipulation. (R1594-1595.) She is another sister of David Brunyer and is married with three children. She stated that prior to the murders, David purchased detonating cord. When David got in an argument with his brother, Steven, David threatened to blow up Steven's house.

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[17]Although Duchesne Sheriff Lt. Travis Mitchell testified that he took the phone call from Hill, he stated that he never wrote a report about the call. Mitchell related the information to other police members who were investigating the case, but stated he did not personally tell Brunyer about the call. (R1759: 106-111.)

Shortly after the murders, Moellmer called the Duchesne County Sheriff's Office to relay her concerns about David and his unreliability. She was told by a deputy that "we have everything under control." She had no further contact with the Duchesne County Sheriff's Office. No report of her contact with the police was made.

When Moellmer read an article in the paper about a Timex watch, she recognized that statement as something that her brother David would say and attribute to someone else. She does not believe that her brother is credible, and she is frightened of him.

David Brunyer testified that he does not like his sisters and believes they are narrow minded, very protective, and religious women. He described them as "very jealous and vindictive." (R1758: 145.)

Gene Kelley testified by stipulation that in 1996 David Brunyer "had been ripped off by some Mexicans in a drug deal and had lost a lot of money in the deal." (R1588-1590.) Brunyer then approached Kelley, asked him to kill these people, and told him he would provide a rifle for the killings. Kelley refused Brunyer's request. Later that year, Kelley was at the Brunyer residence and had an argument with Brunyer. Brunyer picked up a rifle and fired at Kelley, narrowly missing his head.

Brunyer also told Kelley that Brunyer had once planted a gun inside the home of two people who were on probation and then called the police. Brunyer told him, "These guys fucked me around on a deal. I did something about it. They were causing a problem, so I took care of the problem."

Brunyer also testified at the hearing on the motion for new trial and admitted, after an initial denial, that he had told defense investigator Todd Gabler that he had been offered

$50,000 by Sgt. Wally Hendricks of the Duchesne County Sheriff's Office for the conviction of Pinder in this case. (R1758: 138-140.) Brunyer told Gabler that other deputies and Brunyer's wife were present when the offer was made. Brunyer complained to Gabler that he was not paid.[18] (R1758: 142.)

Todd Gabler testified that Brunyer made the statements on the tape in mid-October 2002 and that Brunyer was not intoxicated when the statements were made. (R1758: 172-173.)

Finally, numerous witnesses testified through stipulations about the relationship between David Brunyer and his daughter Andrea. The details of this testimony have been filed under seal and will be set out in a sealed addendum to the brief.

C. The Real Ruiz - Ruiz's Drug Dealings and Involvement in a Prior Drug Murder

New testimony and documentary evidence was presented that Ruiz was a large drug-dealer who FBI, Colorado, and Utah authorities believed was heavily involved in the Mexican Mafia drug trade and in the murder of another drug-dealer, Todd Skidmore, a rival in the drug trade. Those who did business with Ruiz were afraid of his violent temper and his gang-related connections.

At trial, Ruiz denied being a person with a violent nature, denied beating his ex-wife, and denied ever threatening anyone with a gun or threatening to kill anyone.[19] (R1778: 105-

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[18]Only after hearing the tape of the conversations containing his statements, did Brunyer admit to telling Gabler of the offer of money in exchange for his testimony. Brunyer then claimed to have been drinking when he made the statement to Gabler. (R1758: 139.)

[19]Ruiz grudgingly admitted that he shot a round of ammunition into John's dining room table on one occasion when he was angry with Berry Johnson, John's step-son, because Ruiz

115.) However, evidence contained in FBI and police reports produced at the hearing on the motion for new trial revealed that Ruiz was a violent, unpredictable drug dealer who was always armed with concealed weapons, threatened others with violence and death for minor infractions, and who bragged about his knowledge of explosives and of killing people. The previously undisclosed evidence demonstrated that in 1997 Ruiz was a central participant in the killing of Skidmore in Vernal, Utah, who was beaten, kidnapped, and driven by Ruiz's close family relatives across the Colorado border, where he was shot and his body dumped in the desert.

Jerome Wilcox provided information to police that Ruiz was with the people charged in the Skidmore murder, Gerado Perez, Frank Sanchez and Ignacio-Acero, a day before the murder. Ruiz was armed with a pearl handled pistol at that time and was discussing "taking care" of Skidmore with the others in the room. (R1766: Exs. 8 and 9.)

James Nak provided information to the police that shortly before the Skidmore murder Ruiz and Perez had taken over the drug trade in Vernal and made numerous trips to California and Mexico to import the drugs. (R1766: Ex. 19.)

Jennifer Floyd, who was present the night Skidmore was kidnapped and eventually murdered, told police in 1997 that Ruiz and Skidmore had been at her house just days before the murder and that Ruiz had personally threatened to kill Skidmore. Ruiz had to be restrained from harming Skidmore by Ruiz's cousin, Perez, who was eventually charged in the Skidmore killing. (R1776: Exs. 4 and 5.)

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wanted Berry to admit that he had set up Ruiz for stealing a check from Pinder. (R1778: 72-75.)

Perez fled Utah after the killing. Within three days of the killing, Ruiz was found in San Bernadino, California, at a house with Perez's mother. Perez was not there. Perez's car, which was at the house and was seized by police, contained a large number of weapons. Ruiz was detained and then released. (R1766: Ex. 10.) After the car was seized, the police searched it and discovered evidence which indicated that Skidmore had been held in the trunk of the car, corroborating the testimony of witnesses to the crime. (Ibid.)

None of the evidence or investigative reports indicating Ruiz's involvement in Skidmore's kidnapping and murder was disclosed to Pinder before trial and thus was never available to be presented to the jury at trial. Instead, Ruiz testified merely that he had assisted the police in bringing his cousin, Perez, back from Mexico.[20]

Kenneth Wallentine, the Uintah County deputy attorney, was involved in the prosecution of Perez before Perez was extradited to Colorado. While the Perez matter was not his personal case, Wallentine had seen the police reports from San Bernadino and other FBI reports and was aware that Ruiz was involved in the case. (R1757: 28-32.) Although Wallentine assisted the Duchesne County case by preparing the search warrants, he never informed the prosecution

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[20]Gary Potter, trial counsel's investigator, interviewed several witnesses involved in the Skidmore case in 1997 on behalf of Perez. Potter was only involved in that case for a brief period of time and completed his work on that case in April 1997. At that time he was not interested in further investigating Ruiz or his role in the case as there were no case reports Potter saw which implicated Ruiz, and no one provided a report that Ruiz had threatened Skidmore shortly before the murder. Potter was never provided any of the above information regarding Ruiz's involvement in the Skidmore murder. He would have been interested in this information and followed up on it had it been provided by the various government agencies who investigated the case. (R1758: 165-166.) None of the witnesses discussed above who had the information about Ruiz's involvement in the Skidmore murder were connected to Pinder. Had this information been provided, these witnesses could have been called as witnesses at trial and could not have been impeached through any connection to Pinder, unlike the witnesses who did testify.

about his knowledge of Ruiz's involvement in the Skidmore murder, in drug trafficking, and in threats to other people. (Ibid.)

Wallentine testified that he had heard rumors about the Mexican Mafia in Utah but denied its existence. (R1757: 36-37.) Wallentine also testified that there were other reports involving Ruiz and the investigations in the Uintah basin; however, Wallentine was under an obligation to federal authorities not to disclose these documents. (R1757: 55-56.) He acknowledged that these investigations involved the possible prosecution of local police officers and an FBI agent, who allegedly tipped off Dave Antillon about an impending search. (R1757: 64-66, 71-72.) Agent D'Leon testified at trial that Pinder was involved in an investigation of Antillon and Ruiz around this time. (R1783: 15-18.) In addition, Pinder had provided information about FBI agents in the area who were mentioned in the reports Wallentine had reviewed. (R1783: 17-18.)

Melissa Cowles testified by stipulation that Duchesne Sheriff Stansfield told her that Ruiz was a dangerous person who was part of the Mexican Mafia and had been involved in a prior killing. Stansfield acknowledged telling Cowles that Ruiz may be involved with the Mexican Mafia but contended that these were only rumors. (R1757: 81.) He furthermore admitted that he was aware that Ruiz's possible involvement in the Skidmore murder had been discussed with his officers but denied that he told Cowles that Ruiz had committed the murders. (R1757: 84-86.)

SUMMARY OF ARGUMENT

Several witnesses came forward after trial and presented testimony that the two main prosecution witnesses made admissions that they, not Pinder, committed the murders. In

addition, Pinder presented numerous other new witnesses who presented evidence to corroborate these witnesses. The trial court failed to examine the new evidence collectively and usurped the role of the jury by ruling that these witnesses lacked sufficient credibility to warrant a new trial, even though one of the witnesses was a government informant.

Prior to trial, the State had significant exculpatory evidence relating to the criminal background of the main prosecution witness, Ruiz, related to involvement in a prior drug murder. This information included FBI reports which could have been used by the defense to support its theory of the case that Ruiz committed the murders. In addition, the State failed to disclose extensive reports detailing police corruption in the Uintah Basin, some of which was related to drug activities in which Ruiz was involved. This evidence was material and the failure to disclose it warrants reversal.

The State was permitted to grant immunity to Barbara DeHart for the sole purpose of having that witness deny making statements to other persons. The State then called three other witnesses who were allowed to testify that Pinder allegedly made admissions to DeHart which would not have been otherwise admissible. The improper introduction of Pinder's alleged admissions requires reversal of the convictions.

The State was also permitted to introduce, by way of Andrea Brunyer's testimony, the out-of-court statements Brunyer made to his daughter after the killings and after Brunyer participated in the destruction of evidence. These statements were incorrectly admitted as prior consistent statements despite the fact that the statements were made after Brunyer had developed a motive to fabricate his story.

The State was also incorrectly permitted to introduce Andrea's hand-written notes detailing her father's statements. Andrea's notes were unreliable in that the actual document introduced by the State did not consist of the original notes transcribed by Andrea, but instead was a re-written version of Brunyer's account that Andrea put together from her first set of notes.

The trial court improperly instructed on the affirmative defense of compulsion, thereby lessening the State's burden of proof in violation of the United States Constitution.

LAW AND ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE

The new evidence in the instant case consists of independent witnesses who testified that Ruiz and Brunyer made admissions to them that they, Ruiz and Brunyer, and not Pinder, were present when Ruiz shot Flood and Tanner. Prison inmate Joey Silva testified that while incarcerated together Ruiz confessed to him that Ruiz and Brunyer killed Flood and Tanner, and that Pinder was not present. (R1759: 8-9.) Leann and James Hill, Brunyer's sister and her husband, testified that David Brunyer was a dangerous, volatile man whose testimony could not be trusted. Leann testified that her brother Robert came to her seeking advice because their brother David had confessed to him of David's participation in the actual murders. Robert Brunyer testified that his brother David made admissions to him that Brunyer and Ruiz killed the couple and that Pinder was not present. Kristy Barnes testified that Brunyer also told her that Ruiz had killed Flood and Tanner and that Pinder was not present. Barnes testified that David had told her he had been paid $22,000 by Duchesne County for his testimony. Finally, Brunyer himself admitted, after first denying it, that he told people post-trial that Duchesne County had offered him $50,000 to testify against Pinder.

In addition, Christina Moellmer, another of Brunyer's sisters, testified that David had access to explosives and had threatened to blow up his brother's house. Gene Kelley testified by stipulation that Brunyer fired a rifle at Kelley's head, trying to kill him, and that

Brunyer had been involved with some Mexicans in a drug deal gone awry and had wanted Kelley to kill these Mexicans over a drug debt.

In denying the motion for new trial, the trial court concluded that all these witnesses lacked credibility and that the substance of their testimony was inconsistent with the evidence presented at trial. (R1695.) Because each of the trial court's conclusions is not supported by the record below, because the trial court misstated relevant facts in the record and ignored others, and because the trial court misapplied the law, the trial court abused its discretion, and the denial of the motion for new trial must be reversed.

When a defendant seeks a new trial based upon newly-discovered evidence, this Court has long held that he must demonstrate that the evidence meets three factors: 1) it could not, with reasonable diligence, have been discovered and produced at trial, 2) it is not merely cumulative, and 3) it must make a different result probable on retrial. See, *State v James*, 819 P.2d 781 (Utah 1991); *State v Martin*, 1999 UT 72, ¶¶ 5, 17, 984 P.2d 975 (*Martin I*), and *State v Martin*, 2002 UT 34, 44 P.3d 805 (*Martin II*). This Court has recently reaffirmed these principles in *State v Montoya*, 2004 UT 5, ¶ 11, 84 P.3d 1183.[21]

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[21]Whether this Court has expanded this list of factors to include a fourth – that the evidence "must not be used solely for impeachment" – is debatable. See, *Julian v State*, 2002 UT 61, 52 P.3d 1168, citing *James* and *State v Worthen*, 765 P.2d 839, 851 (Utah 1988); and *Wickham v Galetka*, 2002 UT 72, 61 P.3d 978. Both *James* and *Worthen* stood previously for the proposition that "[*g*]*enerally*, newly discovered impeachment evidence does not warrant a new trial," *Worthen*, 765 P.2d at 851[emphasis added] and prior cases have granted new trials when the evidence went to the core of the case against the defendant, even if the evidence was in the form of impeachment.

The new evidence at issue in *James* was the testimony of a new witness who impeached an inmate who testified that he heard an alleged jailhouse confession by the defendant. The new witness provided testimony that the inmate who heard the alleged confession was lying about it to curry favor with the prosecution in his own case. The trial judge had concluded this

In *Martin I*, the Supreme Court reversed the denial of a motion for new trial unanimously holding that the defendant was entitled to discover the information he sought which carried "strong" impeachment value and could significantly impact "the central issue of the case – [who] to believe about the circumstances of the sexual contact." *Martin I*, 1999 UT 72, at ¶ 16.

On appeal after remand, this Court held that the "newly discovered evidence possesses a reasonable likelihood of both discrediting [the victim's] testimony and making [the defendant's] version of the events more credible." *Martin II*, 2002 UT at ¶ 49. The Court reversed the conviction on the three factor test outlined above and held:

> Accordingly, in recognition of the crucial role of credibility to this case – and in view of the far-reaching impact the newly discovered evidence could have on a jury's determination of that issue – we hold that the trial court erroneously concluded the evidence was too "insignificant" to constitute grounds for a new trial. The newly discovered evidence is not only material and relevant to the "central issue" of the case, but, if accepted as such by the jury, may constitute the difference between conviction and acquittal.

Id. at ¶ 49.

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evidence would only go to credibility and would be cumulative of the defendant's own trial testimony in which he denied making the jailhouse confession.
In reversing the trial court on this point, this Court found that the evidence went beyond mere credibility and "established independent evidence that [the witness] had deliberately committed perjury in an attempt to subvert the trial process to his own ends." *James*, 819 P.2d at 794.

Moreover, both *Julian* and *Wickham* involve post-conviction petitions which place a higher burden on the petitioner than a motion for new trial places upon a defendant. *Julian*, 2002 UT 61, ¶ 16; *Wickham*, 2002 UT 72, ¶ 17. In contrast, this Court recently granted a motion for new trial on the basis of evidence which impeached the testimony of the complaining witness and applied the three factor test adopted in *James*. *Martin II*, 2002 UT at ¶ 51. Interestingly, neither *Julian* nor *Wickham* cite either *Martin I* or *II*, the latter case being decided a mere three months before *Julian*.

This Court has cautioned trial courts about the care and standards which must be applied in situations which will exclude new evidence from a jury. In *State v Loose*, 2000 UT 11, 994 P.2d 1237, the Court rejected the Court of Appeals grant of "great latitude" to the trial court in determining the credibility of a recanting witness's testimony.

> We are not comfortable with the court of appeals' broad characterization of the cited case law, or the sweeping discretion it purports to give trial judges in determining witness credibility, even in the new trial context. *We proceed with caution where a trial judge's weighing of credibility has the result of keeping otherwise admissible evidence from the jury.*

Id. ¶ 18 [emphasis added].

> [W]e conclude that it is appropriate in the context of a new trial motion based on newly discovered evidence to consider the testimony's probable weight as part of the determination as to whether that testimony would "make a different result probable on retrial."

Ibid.

Although part of the weight discussed by the Court certainly is the likelihood that a jury would find the new evidence credible, probable credibility alone is not the determinative issue. Rather, it is the interplay between credibility, the substance of the proffered testimony, and the other evidence offered at trial. *Ibid.*

While the trial court in the instant case acknowledged these legal principles in its conclusions of law (R1695-1752), the court did not follow the dictates of this Court in assessing the likely impact of the new evidence on the jury verdict in this case. The trial court held not only that the defense witnesses were not credible, it also concluded that the State's witnesses, including Ruiz, were entirely credible. Moreover, the trial court relied upon facts which were not supported in the record. For example, the trial court found that "Filo Ruiz denies ever speaking to Joey Silva." (R1712, 1706.) However, Ruiz only stated through a stipulation, that

he did not speak with Silva on one specific date. (R1759: 48-50.) Silva testified that he had spoken with Ruiz several times while they were in jail together. (R1759: 8, 27-28.) By making itself the final arbiter of fact regarding the extensive newly discovered evidence presented post-trial, and ignoring much of the evidence presented to support both the substance and credibility of the new witnesses, the trial court abused its discretion in denying the motion for new trial and violated Pinder's right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

A. Joey Silva

Although the trial court acknowledged that Silva's information is newly discovered evidence and that Silva was fearful of his safety if he testified in this matter,[22] the court nonetheless concluded that Silva lacked credibility and that a jury would not believe Silva given the difficulties of obtaining Silva's testimony in open court[23] and because of his criminal record.

The trial court's ruling is contrary to this Court's decision in *State v James*, 819 P.2d 781, and is not supported by logic or the record. In *James*, this Court did not even discuss the question of the ultimate credibility of the jailhouse informant. There, the prosecution used a jailhouse informant, who claimed he heard the defendant confess to the murder, to prove its

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[22]Silva informed Gary Potter, trial counsel's investigator, of his concerns for his safety in 2000. Silva also discussed his safety concerns with the state investigators during various interviews. Moreover, prior to his coming forward in this case, he had lodged his safety concerns against one of the Duchesne County Sheriff's relatives involved in this case. Indeed, Silva believed that threats by this investigator had been made against him during one of the interviews. (R1759: 14.)

[23]The trial court spent numerous pages of its findings discussing the history of the difficulties of obtaining Silva's testimony in open court. Although the difficulties were the direct result of Silva's legitimate safety concerns, which the trial court acknowledged, the trial court inexplicably relied heavily upon this history to find that Silva lacked credibility.

case against the defendant. After trial, a Utah state prison inmate came forward to testify that the prosecution's informant told him the informant "had fabricated his testimony at trial in an attempt to get better treatment from the state at his own criminal trial." *James*, 819 P.2d at 793. This Court held that "[e]vidence from a neutral third party is not merely cumulative of a criminal defendant's testimony. It is of a different kind and nature than defendant's statements, and it certainly could have a different quality *in the eyes of the jurors who assess the credibility of the witnesses*." *Id.* at 794-795 [emphasis added; footnote omitted].

Moreover, the trial court's finding regarding Silva flies in the face of the government's extensive use of jailhouse informants in the prosecution of cases throughout Utah and other states. It defies logic that a jailhouse informant for the prosecution, who stands to gain from testifying for the state, is somehow more credible than an informant for the defendant who the government admits has been successfully used in the past to the government's advantage, who receives no benefit, and who must jeopardize his own safety by testifying in open court.

Under most circumstances, a prison informant will have at least one felony conviction. Very often the felony conviction will be for a crime of moral turpitude. Thus, such informants will often have a record that makes their credibility subject to question. Indeed, in this very case, the prosecution relied heavily upon a jailhouse informant, Newly Welch, who had numerous felony convictions for crimes of moral turpitude and who state officials testified was not credible. The State not only presented Welch's testimony at trial, it relied upon it in closing argument. Despite the inherent weakness of jailhouse informant testimony, prosecutors continue to rely on such witnesses, juries often convict in large part based upon their testimony and appellate courts affirm the convictions. See, e.g. *State v Martinez*, 2002 UT App 126, ¶ 43,

47 P.3d 115; *State v Dunn*, 850 P.2d 1201 (Utah 1993); *State v DeCorso*, 1999 UT 57, ¶79, 993 P.2d 837; and *State v Stewart*, 724 P.2d 610 (Utah 1986). Had the prosecution sought to convict Ruiz and had the prosecution possessed the evidence from Silva, this Court can assume and be assured that the prosecution would have presented that evidence to a jury.

The record demonstrates that Silva's testimony has consistency which proves its reliability. His information concerning Ruiz and Brunyer was provided after a trial in which the defense had not tried to prove that David Brunyer was present at the murders with Ruiz. Thus, Silva could not have learned through anyone other than Ruiz of this critical fact in this case. Accordingly, Silva did not have the opportunity to tailor his testimony to any claims that had been raised at the trial and thus made public. Further, jail records prove that Silva was in the same jail with Ruiz at the time Silva alleged, and Silva picked Ruiz out of a photo spread when Silva met with the state investigators in this case. Finally, Silva could expect little assistance from the defense in securing his safety, or any other benefit, and his initial unwillingness to testify further supports his reliability.[24]

The credibility and content of Silva's testimony should be left to the province of the true finder of fact, especially when contrasted with the inconsistencies presented in the State's case at trial, the use of informants, and the plea agreement provided Ruiz. A jury should be permitted to determine whether the testimony of the law enforcement agents who attempted to impeach Silva was credible in light of the fact that Silva had supplied truthful information to many of these officers in the past and had continued to do so right up to the time he testified at the motion for new trial in 2002. To permit a judge to prevent exculpatory evidence, which

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[24]Any movement inside the prison was provided only with the assistance of the State.

incriminates the State's two critical witnesses, from ever reaching the jury forecloses a defendant from using such evidence and creates a fundamental unfairness in the criminal justice system which violates a defendant's right to the due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Utah Constitution.

As it stands now, the trial court improperly acted as the ultimate gatekeeper ruling that because it did not believe Silva's testimony, no jury would. The judge improperly relied on the events surrounding Silva's testimony to create a finding that Silva was manipulative, rather than acknowledging the grave risks that a person in custody takes to testify against a member of a known criminal organization like the Mexican Mafia. A single judge cannot bar a defendant from having his constitutional right to have a jury decide the charges against him. See, e.g. *Ring v Arizona*, 536 U.S. 584 (2002) [jury not judge must make findings on all elements of charged offense].

B. Additional Evidence

On review, this Court must consider collectively all of the new evidence presented collectively. Thus, this Court must consider the evidence from the three witnesses who have testified about admissions made by Ruiz and Brunyer: Joey Silva, Robert Brunyer and Christy Barnes. In addition, this Court must consider the evidence concerning Ruiz's numerous threats and involvement in the Skidmore murder as well as his involvement in the distribution of drugs.[25] Finally, this Court must consider the evidence about Brunyer's credibility, his threats

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[25]If this Court rejects the *Brady* claim that this evidence should have been disclosed by the prosecution, the substance of this evidence must be considered part of the newly discovered evidence discussed above. Neither the prosecution nor the defense could have reasonably discovered this evidence if there was no duty on the prosecution to disclose this evidence to the defense. In fact, a member of the prosecution team, Wallentine, had been

against his own family members and others, his violent history, his post-trial admission that he was offered a large amount of money for his testimony and actually may have been paid part of those monies, and the evidence of Andrea Brunyer's relationship with her father David.

No jury has heard any of this evidence. It is for the jury to determine the ultimate credibility of the witnesses in this case. Certainly the new witnesses' credibility will be subject to attack before a jury, but this Court must consider their evidence cumulatively, especially because each witness's testimony corroborates the other's in the basic claim that Brunyer and Ruiz committed the murders and that Pinder was not present.

While Robert Brunyer and Barnes knew each other and were usually together when David Brunyer made his admissions to them, they had never heard of Silva, whose testimony about Ruiz's admissions corroborated that of David's admission. Had this evidence been known before trial, it certainly would have been admissible. Indeed, the entire nature of the trial and the defense presented would have been changed. Moreover, this Court cannot ignore, as did the trial court, that Ruiz testified under a beneficial deal with the prosecution, which got even better after he delivered the convictions, something the jury was never told. In addition, David Brunyer's denial under oath of being offered money for his testimony has now been shown to be perjurous, a fact that might well have influenced a jury. While the trial court completely and improperly disregarded this admission by Brunyer, this Court cannot deny the potential impact it may have on a new jury.

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provided the confidential FBI reports which he understood were sensitive and were not to be disclosed to anyone outside the Uintah County Sheriff's Office.

Here, the trial court inserted itself in place of the jury, wholly sided with the prosecution, and did not allow the jury to assess the credibility of the witnesses.

> [T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards for criminal trials. . . . In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of the accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Bollenbach v United States, 326 U.S. 607, 614-615 (1946).

The trial court then concluded that the substance of the new evidence would not result in a different verdict. To support this legal conclusion, the trial court relied almost entirely on "inconsistencies" in Robert Brunyer's testimony which are challenged below, while ignoring other corroborating evidence that Ruiz confessed to Silva and implicated David Brunyer and that Brunyer admitted his participation in the killings to Kristy Barnes. Although the trial court acknowledged there had been some evidence of a prior money offer by the FBI for David Brunyer's testimony, it ignored Brunyer's post-trial admission that he had in fact been offered money by Duchesne County for his testimony though denying this at trial. This is newly discovered evidence, as the offers Brunyer admitted to at trial were allegedly made by the FBI *prior* to the deaths of Flood and Tanner, which was separate from the later Duchesne County offer. Indeed, the taped admission of a payoff in exchange for testimony against Pinder, which Brunyer grudgingly acknowledged, certainly is not cumulative and may well have had a tremendous impact on the jury when combined with the testimony of the other new witnesses. Thus, the judge's conclusion that the testimony about this payoff was cumulative because ranch hands Joseph and Christie Andrews testified to it at trial was incorrect. The Andrews' testimony

concerned an alleged offer from the FBI and had nothing to do with the separate Duchesne County offer.

There is no dispute that at trial the defense did not claim that Brunyer assisted Ruiz in committing the murders. However, there was a good reason for that, as this information was not known and could not have been discovered before trial; the new evidence that proved that Brunyer was directly involved consisted of Brunyer's self-incriminating statements made after trial and Ruiz's statements to a jail inmate which were first made known to the defense *after* trial. Since Pinder was not present at the murders, there was no way he could have known who was actually present at the time of the murders. Pinder could only rely on the discovery provided to him by the State which demonstrated that at least Ruiz was there.

In denying the motion for new trial, the trial court set out its version of the trial facts which relied heavily on the purported admissions of Pinder that came in through third parties and which were never corroborated through the state's investigation. The court also noted that Pinder allegedly made admissions to David Brunyer and Newly Welch. But the trial court ignored Brunyer's motive for lying about such admissions – his own participation in the murders and the offer of money to assist in obtaining the conviction of Pinder. The trial court also ignored Welch's position as a jailhouse informant and four-time convicted felon, as well as the testimony of inmate John White that Welch admitted to fabricating the admission (R1782: 70-75) and the testimony of jailer Anderson who testified about the incredible lies Welch had told as an inmate. (R1783: 5-9.) In each instance, the trial court granted full credibility to the State's witnesses while categorically rejecting any witness who contradicted them thus usurping the role of the jury and ignoring the dictates of *Loose*. For example, the trial court emphasized

that the confrontation before the killings started in a house not a trailer. (R1699.) However, the trial court ignored the trial testimony that David Brunyer had been seen near Tanner's trailer firing a weapon shortly before the killings and that bullet holes were later observed in the trailer. In addition, the trial court erroneously states that Silva testified the confrontation occurred at the trailer as well. (R1711.) But Silva testified that the incident started at the "house." (R1759: 9.)

Again, the trial court is not the jury, and it is an abuse of discretion for the judge to attempt to prohibit a jury from assessing the ultimate credibility of these witnesses. This is not a legal claim that there was insufficient evidence to convict, but that there is a reasonable probability of a different result when the new evidence is examined by a new jury.

Here, Ruiz's and Brunyer's admissions to new witnesses that they committed the murders, without Pinder, would greatly support Pinder's testimony that he was not involved in the actual killings. While there may have been some inconsistencies in his testimony at trial, Pinder always denied his involvement in the killings and the initial destruction of the bodies, while always admitting his participation in the destruction of the remaining body parts.[26] This case did not contain any hard evidence connecting Pinder to the murders. The only physical evidence, one victim's blood, was located on Ruiz's clothes, and Ruiz had garbage bags, a rifle, and bullets when he was arrested. Instead, the prosecution relied upon the testimony of the actual killers, Ruiz and Brunyer, supported by the testimony of third parties who were allegedly

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[26]The trial court apparently relies on Pinder's admission that he lied during the television interview. Pinder testified that he lied about his participation in the destruction of the bodies but steadfastly denied his involvement in the actual murders. Thus, the trial court's reliance on the interview is incorrect and must be disregarded. (R1696.)

told conflicting stories about Pinder's alleged admissions. While the trial court might be correct in relying upon these witnesses if there was a sufficiency of the evidence challenge, it is an incorrect application of the law and an abuse of discretion on a motion for new trial for the trial court to determine that because it believes one set of witnesses, a jury will also agree with that assessment of the testimony, especially since the new witnesses include close members of David Brunyer's family. For example, the trial court completely ignored the compelling testimony of Leann Hill regarding her conversations with her brother Robert and his inner struggles to come forward with information which might lead to his own brother's conviction for murder. Her testimony demonstrated that Robert was telling the truth about David's admissions even though he had originally told Pinder's investigator at the initial post-trial interview a different story to protect his brother.

Moreover, these new witnesses are not cumulative to the evidence presented at trial. They provide detailed information which supports the claim that Pinder was not involved in the actual murders.

A defendant need not prove beyond a reasonable doubt that a new jury will return a different verdict in order to obtain a new trial. A defendant need only show that it is probable, i.e. that there is a reasonable likelihood that a reasonable jury would have a reasonable doubt as to defendant's guilt. *Martin II*, 200 UT 343 at ¶ 48 [new evidence that the victim had previously accepted a ride from a stranger warranted a new trial on rape and kidnapping charges -- ". . . any newly discovered evidence that could reasonably impact a jury's assessment on this issue – either by discrediting [the victim] or by making [the defendant's] story more credible – is sufficient to make likely 'an outcome more favorable to Martin' and thus require a new trial."]

The Tenth Circuit has found that another individuals' confession to a murder is the type of evidence that makes it reasonable there will be a different result in a further trial. *Scott v Mullin*, 303 F.3d 1222 (10th Cir. 2002)[cases decided in context of *brady* violation for failure to disclose the admission]. Accordingly, Pinder has satisfied his burden, and the trial court erred in denying the motion for new trial.

II. THE STATE VIOLATED ITS DUTY TO DISCLOSE EXCULPATORY EVIDENCE WHICH REQUIRES REVERSAL OF THE CONVICTIONS

At the hearing on the motion for new trial, Pinder presented extensive evidence impeaching the testimony and credibility of Ruiz, the State's most critical witness, by connecting Ruiz to prior threats of murder, major drug dealing, and to the prior drug related kidnap and murder of a man named Todd Skidmore, a rival of Ruiz's in the drug trade.

Evidence was presented that Jerome Wilcox provided information to the police that the day before the Skidmore murder, Ruiz was with Perez, Sanchez, and Ignacio-Acero, the men charged with Skidmore's murder. Ruiz was armed at that time and was discussing with others in the room the need to "solve the Skidmore problem." James Nak provided information to the police that shortly before the Skidmore murder, Ruiz and Perez had taken over the drug trade in Vernal and that they made numerous trips to California and Mexico to import the drugs.

Jennifer Floyd, who was present the night Skidmore was kidnapped and eventually murdered, told police in 1997 that Ruiz and Skidmore had been at her house just days before the killing and that Ruiz had personally threatened to kill Skidmore. Ruiz had to be forcibly restrained from carrying out the threat by Ignacio-Arceo, Ruiz's nephew.

Perez, who is Ruiz's cousin, fled the area after the killing. Within three days of the killing, Ruiz was found in San Bernadino, California, at a house with Perez's mother. Perez was not there. Perez's car was seized by the police along with a large number of weapons. Ruiz was with the car when it was seized and likely drove the vehicle from Utah to California with Perez and Ignacio-Arceo, both who then fled to Mexico. Ruiz was detained and then released.

Police searched the seized car and discovered evidence which indicated that Skidmore had been held in the trunk of the car when he was kidnapped and killed, corroborating the testimony of witnesses to the crime. It is not contested that the car seized in San Bernadino was the car used in connection with the kidnapping and murder of Skidmore.

Although available and accessible to the local authorities who also possessed other related FBI reports and who prosecuted Pinder, none of this evidence was disclosed to defense counsel despite its exculpatory nature. One brief mention of this information was buried in a police report which was provided to the defense, amidst over 3000 pages of discovery. However, this mention was misleading as it stated that Ruiz was not involved in the Skidmore murder, and this report does not mention the extensive FBI investigation which was conducted. (R1757: 83-84.) As the underlying reports show, Ruiz had a critical role in the kidnap and murder of Skidmore. Potter tried to follow up but was not given any of these reports. (R1783: 164-165.) Furthermore, the State did not disclose extensive FBI reports related to internal investigation about police corruption in the Uintah basin. These

reports corroborate both Pinder's testimony about his concerns that agents were out to get him and Brunyer's testimony that the FBI had approached him prior to the murders to "get" Pinder.[27]

Prior to trial, the prosecutor sent a letter to the Utah Department of Corrections informing them that Ruiz would be pleading guilty to five charges and receive two consecutive life sentences for the murders and that Ruiz would be able to serve his time in California. These terms were apparently not acceptable to Ruiz, and the State thereafter made a new and better offer to obtain his testimony. This information was not disclosed to Pinder's defense attorneys. (R1766: Ex. 25.)

"It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v Ritchie*, 480 U.S. 39, 57 (1987). A prosecutor's failure to disclose exculpatory evidence violates a defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Brady v Maryland*, 373 U.S. 83, 87 (1963); *Kyles v Whitley*, 514 U.S. 419 (1995); *United States v Agurs*, 427 U.S. 97 (1976). This obligation applies equally to impeachment evidence and to evidence that was not requested by the defense. *United States v Bagley*, 473 U.S. 667, 682 (1985).

The Supreme Court explained the basis for applying this rule to impeachment evidence in *Giglio v United States*, 405 U.S. 150 (1972). "When the 'reliability of a given witness may well be determinative of guilt or innocence' non-disclosure of evidence affecting credibility falls

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[27]The details of these reports are contained at R1791 which was filed under seal in the trial court.

within th[e] general rule of *Brady*." 405 U.S. at 154. In *Bagley*, 473 U.S. at 676, the Court explained that "such evidence is 'evidence favorable to an accused,' [citation omitted], so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."

Moreover, a conviction cannot stand scrutiny under the Fourteenth Amendment if the prosecution allows false evidence to go uncorrected even if it did not solicit the evidence through direct examination and even if the evidence goes only to the issue of impeachment of a witness. *Napue v Illinois*, 360 U.S. 264, 269 (1959).

These legal principles also apply to consideration of the state due process clause under Article I, Section 7 of the Utah State Constitution. See, e.g. *Walker v State*, 624 P.2d 687 (Utah 1981). "In a criminal trial it is essential that evidence which tends to exonerate the defendant be aired as fully as that which tends to implicate him." *State v Jarrell*, 608 P.2d 218, 225 (Utah 1980).

While the Federal Constitution does not require the prosecution to maintain an "open file" policy and is thus less stringent than the ABA Standards for Criminal Justice, due process does impose a high burden on the prosecution.

> [T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. This, in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.

Kyles, 514 U.S. at 437. "This rule encompasses evidence 'known only to police investigators and not to the prosecutor.'" *Strickler v Greene*, 527 U.S. 263, 280-281(1999) [citing *Kyles*].

These principles were once again recently highlighted by the Supreme Court in a case in which the prosecution withheld evidence from a defendant which would have discredited two

prosecution witnesses. In *Banks v Dretke*, 124 S.Ct. 1256, 1275 (2004), the Court stressed the unique role the prosecutor plays in our system of justice:

> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," [citation], so long as the "potential existence" of a prosecutorial misconduct claim might have been detected, [citation]. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v Gramley*, 520 U.S. 899, 909, 138 L.Ed.2d 97, 117 S.Ct. 1793 (1997) (quoting *United States v Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 71 L.Ed. 131, 47 S.Ct. 1 (1926)). We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. 263 at 281, 144 L.Ed. 2d 286, 119 S.Ct. 1936; accord, *Kyles*, 514 U.S. 419 at 439-440, 131 L.Ed. 2d 490, 115 S.Ct. 1555; *United States v Bagley*, 473 U.S. 667, 675, n. 6, 87 L.Ed. 2d 481, 105 S.Ct. 3375 (1985); *Berger*, 295 U.S. 78 at 88, 79 L.Ed. 1314, 55 S.Ct. 629. See also *Olmstead v United States*, 277 U.S. 438, 484, 72 L.Ed. 944, 48 S.Ct. 564 (1928) (Brandeis, J., dissenting). Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly resting upon the prosecuting attorney, will be faithfully observed." *Berger*, 295 U.S. 78 at 88, 79 L.Ed. 1314, 55 S.Ct. 629. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. See *Kyles*, 514 U.S. 419 at 440, 131 L.Ed. 2d 490, 115 S.Ct. 1555 ("The prudence of the careful prosecutor should not . . . be discouraged.").

"When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Id.* at1263.

The prosecutor has no leeway to hold back evidence because of uncertainty about whether the evidence would prove exculpatory at trial. "[T]he government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result." *Id.* at 439. This is consistent with the Court's long held view that "a prudent prosecutor will resolve doubtful questions in favor of disclosure." *Agurs*, 427 U.S. at 108.

Even though an "open file" policy is not mandatory, the Supreme Court has noted that "this practice may increase the efficiency and fairness of the criminal process." *Strickler*, 527 U.S. at 283, n. 23. And, "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*."[28] *Ibid.* See, also *Banks v. Dretke*, 124 S.Ct. at 1273.

The United States Supreme Court has held that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434. The question is "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Ibid.* Thus, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." *Id.* at 435. Moreover, the suppressed evidence must be examined "collectively, not item by item." *Id.* at 436. In each case, the full breadth of the suppressed evidence must be considered, and a court cannot diminish the effect of the evidence by considering the items independently.

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[28]In this case, the State has contended throughout that it had an open file policy and the trial court found that there was such a policy. (See, R1770: 9-10.)

Under Utah discovery law, upon request by the defendant, the prosecution is required to disclose 1) the relevant written or recorded statements of a codefendant, and 2) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment. "The prosecutor has a continuing duty to make disclosure." U.R.Cr.P., Rule 16(b); *Parson v. Galetka*, 57 F.Supp.2d 1151 (D. Utah 1995).

Rule 16(g) provides broad authority to the trial court to remedy a violation of the discovery rules. *State v. Larson*, 775 P.2d 415 (Utah 1989). That rule reads: "If *at any time during the course of the proceedings*, it is brought to the attention of the court that a party has failed to comply with [Rule 16], the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." [Emphasis added.] A new trial may be ordered upon a violation of discovery under Rule 16. *State v. Martin*, 1999 UT 72, 984 P.2d 975 [new trial denied on violation of this rule solely because defendant did not make a Rule 16 request].

In denying Pinder's motion for new trial, the trial court relied on *State v Spry*, 2001 UT App 75, 21 P.2d 675, to hold that the prosecution did not have a duty to disclose the evidence here. The defendant in *Spry* had been arrested for violations of possession of illegal drugs and drug paraphernalia. Prior to trial, the defendant filed a written complaint against the arresting officer because she had been "roughed up" during the arrest and her car had been destroyed by

fire after it was impounded. A hearing was held on the complaint and a tape recording of the hearing was made by the Internal Affairs Division of the City of South Salt Lake.

In the criminal case, the defendant moved for disclosure of the internal affairs records. The Court of Appeal held that the information was not discoverable from the prosecution because the Internal Affairs Division of the City of South Salt Lake had possession of the records, and there was "no evidence in the record to suggest that the Salt Lake District Attorney's Office had knowledge of the internal affairs record . . ., or came across the same in the course of its investigation." (*Spry*, 2001 UT App ¶ 15.) Moreover, the State stipulated that it would not use the information in the prosecution.[29]

The Court of Appeal held that the proper method for the defendant to obtain the records from an independent agency is the subpoena power granted to the defendant in criminal cases. (*Id.* at ¶ 16, n. 3; Utah Rules of Crim. Pro., Rule 14(b).)

In *State v Pliego*, 1999 UT 8, 974 P.2d 279, on which *Spry* relies, this Court stated that a prosecutor need not "search through the records of every state agency looking for exculpatory evidence on behalf of the defendant." (*Id.* at ¶ 18.) However, this Court also held that

> although the [discovery] rule refers to the prosecutor's knowledge, it is not so limited. The knowledge of the prosecutor's staff and the investigating police officers is imputed to the prosecutor. See, 23 Am.Jur.2d Depositions and Discovery § 421 (1983) (stating that the 'obligation of a state's attorney to disclose information in the possession of the state is not limited to materials in the prosecutor's office, but also includes information held by the various police agencies and officers involved in the case.')

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[29]Apparently, the defendant did not argue at any point that the internal affairs record contained exculpatory information. Instead, the defendant argued only that the record was covered by Rule 16(a)(1) as a relevant written or recorded statement of the defendant. Therefore, no federal constitutional issue regrading the disclosure of exculpatory evidence was considered in the *Spry* decision.

(*Id.* at ¶ 13.)

Because neither case relied upon by the trial court involves the failure of the State to meet the constitutional mandate of disclosing exculpatory evidence to the defendant without request, they are not controlling here. See, *State v Bakalov*, 1999 UT 45, 979 P.2d 799, 811 [adopting the federal constitutional principles under the Utah Constitution]. Thus, the *Spry* holding does not trump the constitutional bases for granting a new trial in this case.

Indeed, the United States Supreme Court has described the duties of the prosecutor in the following manner:

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 US, at 87, 10 L.Ed.2d 215, 83 S.Ct. 1194), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.
>
> The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, ..., and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor. To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio* v *United States*, 405 U.S. 150, 154, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972). Since, then, the

> prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Kyles v Whitley, 514 U.S. at 437-438 [footnote omitted].

The trial court concluded that Pinder failed to demonstrate that Ruiz was involved in the Skidmore murder or that he aided, assisted or ordered the murder or even knew that it was going to occur. (R1736.) The trial court based its conclusion solely on Jennifer Floyd's statement that Ruiz was not present at the time of the murder. In reaching these conclusions, however, the trial court had to completely ignore the extensive evidence of various threats and acts which connected Ruiz directly to Skidmore both before and after the murder. The trial court also failed to address the evidence related to Ruiz's drug dealings which were contained in the reports from local and federal agents uncovered in the Skidmore case. Accordingly, the trial court's conclusions that this information about Ruiz's threats, prior drug dealings, and involvement in the murder was not exculpatory and could not have been used in Pinder's defense must be rejected by this Court.

The suppressed evidence would have been admissible even if Ruiz had not testified. The evidence of his history of drug dealing, of threats, and assaults was relevant to Ruiz's motive and intent to kill as well as his identity as the killer. In *Kyles*, the police obtained information from an informer in the case who is referred to in that opinion as "Beanie." Despite the fact that Beanie was neither a prosecution nor defense witness at trial, the Supreme Court held that the failure of the police to disclose Beanie's involvement in a prior, even unrelated killing, was error. The Court held that the suppressed information would have assisted the defense in their

attempt to prove that Beanie, not Kyles, was the actual killer. *Kyles*, 514 U.S. at 442, n.13. In part, it would have provided additional substance to the argument that Beanie was ingratiating himself to the police by pointing the finger at Kyles. Thus, the trial court's conclusion in Pinder's case that this evidence would have been barred under Utah Rules of Evidence 404 and 608(b) is incorrect.

Finally, the suppressed evidence of Ruiz's direct involvement in a prior murder would have added critical evidence to support the defense theory that Ruiz, not Pinder, was the killer. In addition, the evidence of Ruiz's close connection to the Mexican Mafia and drug dealing would have supported the defense that Ruiz killed Flood and Tanner over involvement in drugs that had nothing to do with Pinder. Because the State failed to provide this information, the defense was left to rely on the impeached testimony of employees and friends of Pinder, each of whom was attacked on cross-examination because of their financial or employment relationship with Pinder. All the while, extensive evidence that strongly supported the defense theory, given by individuals entirely unconnected to the Pinder ranch a year prior to the Flood/Tanner murders, remained hidden in police files.

Because this evidence was suppressed, the defense was forced to rely on vague statements made by Ruiz to Pinder's ranch employees that he, Ruiz, had killed before. Without outside testimony substantiating Ruiz's history, Ruiz's violence and threats to others was limited to instances at and around the ranch, some of which Ruiz contended were related to Pinder or which he denied even in the face of contradicting testimony from David Brunyer. Had the jury heard the testimony of Jennifer Floyd that she had seen Ruiz threaten Skidmore with a gun a short time before Skidmore was kidnapped, shot, and dumped in the desert from the same car

Ruiz was found near in California, it may well have believed Pinder's testimony that he was threatened and assaulted by Ruiz and that Ruiz was responsible for the murders.

Similarly, the defense was forced to leave unchallenged Ruiz's grudging acknowledgment that he had sold "some drugs" in the past while the State sat on police reports from local, state, and federal agencies demonstrating that Ruiz was intricately involved in multi-pound importations of methamphetamine from Mexico, through California, to the Uintah Basin, a drug business over which he had recently taken control. Again, disclosure of this information would have enabled the defense to present the true picture of Ruiz as the drug runner, enforcer, and killer that he was.

The full discovery about Ruiz's involvement in the Skidmore killing also would have shown the jury how Ruiz had previously used the police in the past to avoid his own conviction by casting suspicion on others. The evidence regarding the threats Ruiz made to Pinder and others around the time of the killings also would have been admissible, thereby supporting the reasonableness of Pinder's testimony that he assisted Ruiz in disposing of the body parts out of fear of Ruiz.

Because the trial court incorrectly concluded that the above information was not exculpatory and could not have been used in Pinder's defense, the trial court abused its discretion in denying Pinder's motion for new trial.

III. THE COURT'S ERRONEOUS EVIDENTIARY RULINGS REQUIRE A NEW TRIAL

A. Melissa Cowles' Testimony

Barbara DeHart testified at trial under a grant of immunity from the prosecution which made her available as a witness under rule 801(d)1(a) of the Utah Rules of Evidence. DeHart asserted her Fifth Amendment privilege when she was called to testify at Pinder's preliminary hearing. (R1933: 42.) During the prosecution's direct examination of DeHart, the prosecution declared her an adverse witness and used leading questions both to impeach her repeatedly and to elicit her denials of making out-of-court statements to her daughter Melissa Cowles about admissions allegedly made by Pinder and about certain events that allegedly happened after the killings. At the outset, the prosecution was well aware that DeHart would deny making such out-of-court statements to her daughter, because she had consistently denied making the statements both in interviews with police and under oath at her own trial.

Thereafter, the prosecution called Cowles to testify to the substance of Pinder's alleged statements to DeHart and other statements DeHart allegedly made to Cowles.

1. Summary of Relevant Facts

Cowles testified over objection that her mother called her on Monday, October 26, 1998, complaining that Pinder had been out all night with Ruiz and Brunyer, and that DeHart had made a nice dinner but Pinder had not shown up.[30] (R1781: 101-102.) About thirty minutes later, Cowles and her mother spoke again by phone. Her mother sounded upset and

[30]Ruiz testified that they had eaten dinner together. (R1778: 21.)

scared, saying that Cowles "couldn't even imagine what was going on down there," and that DeHart wanted to come home. (R1781: 102.)

Some days later, Cowles saw her mother at her father's house in Cataldo, Idaho, where her mother said that Ruiz had just been arrested at the ranch, and she thought he had murdered someone. (R1781: 103.)

Cowles spoke to her mother by phone on Sunday morning, November 1, 1989. Cowles testified that her mother, sounding frantic and scared, told her that Pinder admitted to killing some people on the ranch, he had told her everything, and she and Pinder had to go to a car wash. (R1781: 104-105.) Her mother came to Cowles's house a couple hours later and repeated that Pinder had admitted to the murders of a ranch hand and his girlfriend who were shot, and that she and Pinder had gone to the car wash on Halloween night to vacuum Pinder's car and wash out blood stains. Cowles further testified that DeHart said she found a bag of what looked like bloody hair and scalp beneath the passenger seat, and she threw it in the garbage. (R1781: 105-106.) DeHart claimed to have thrown the murder weapon, which was Pinder's gun, off a bridge into the river. (R1781: 106-107.)

Cowles testified that later that afternoon she spoke to her mother again and at that time "her [mother's] whole story had changed. . . . She said that John was innocent, and that Filo and Dave had murdered the ranch-hand and his girlfriend." (R1781: 108.) Cowles testified that she asked her mother why her story had changed, but her mother had no explanation. (Ibid.)

On cross-examination, Cowles testified that when her mother was angry she would sometimes say things that were not true, but would later tell the truth when she realized she was

wrong. Thus, Cowles was not sure whether any of what her mother told her was true. (R1781: 112-114.)

In closing argument, the prosecution relied heavily on its impeachment of DeHart and the testimony of Cowles to argue that Pinder was guilty.[31]

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[31]The prosecution spent considerable time going over the inconsistencies of DeHart's testimony when compared to that of Melissa Cowles, and stressed the fact that Pinder confessed to DeHart:

> You hear it, and particularly heard it from Melissa. And Mrs. DeHart, her mother, is over there, frantic, excited, non-plussed, saying, "last night John admitted to me everything. He told me that he had murdered those two people in Utah, that he had shot them and blown them up."

(R1786: 27-28.)

In closing rebuttal, the prosecution belabored DeHart's bias and lack of credibility:

> And finally, Barbara's loyalty. Boy that one is unquestioned, isn't it? From the very time she's taking him sandwiches, after a hard day's work of picking up body parts, all the way to throwing away the murder weapon, which explains why there is no 10-millimeter to be found, which explains why she's giving him her gun when she leaves him off in Las Vegas, . . . All the way. . . . Well, in order to believe the Defendant's girlfriend's story, you've got to disbelieve Bernie, Damion, Melissa, ...

(R1786: 101-102.)

Finally, the prosecution closed with Knapp's testimony:

> The most significant problem amongst all the other problems [the defendant has] is what Bernie knew, what Bernie knew; Sunday, November 1st, after the telephone call from his daughter. . . . On Monday, November the 2nd, during that autopsy Dr. Gray told you, he found a piece of skin or a flap of skin on the torso, and he peeled it down. And for the first time he saw bullet holes. Rex had been shot. But Bernie knew it the day before. He knew it sitting in his home just south of Coeur

Cowles' testimony about Pinder's alleged admissions to DeHart, which DeHart allegedly repeated to Cowles was inadmissible, highly inflammatory testimony that unfairly prejudiced Pinder.

2. The Trial Court Erred in Allowing the Prosecution to Call DeHart for the Primary Purpose of Introducing Otherwise Inadmissible Evidence

Although rule 607 of the Utah Rules of Evidence allows any party to impeach a witness,[32] there is great potential for abuse in allowing the government to impeach its own witness. The danger, which has long been recognized by the courts, is that the government will call a witness knowing him or her to be adverse, merely as a means of getting otherwise inadmissible evidence before the jury.[33] Accordingly, "impeachment is not permitted where it is

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> D'Alene, Idaho. He knew that that ranch hand and his girlfriend had been shot and blown up. How could he have known that unless her boyfriend, the killer, told her? Well, at least Mrs. DeHart told you one thing that was true. Everything that she knew about the night of the murders came from him.

(R1786: 103-104.)

The prosecution was able to argue the "importance" of what Knapp knew by relying on Cowles's testimony. Because Knapp did not know the identity of the person or persons who shot Flood and Tanner, his knowledge that Tanner had been shot only becomes important when combined with Cowles's testimony that Pinder confessed the shooting to DeHart.

[32]Rule 607 of the Utah Rules of Evidence is identical to the federal rule, both of which state, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." See Fed.R.Evid. 607.

Federal application and interpretation of the federal rules is pertinent to the meaning and effect of the Utah rules where the Utah rules have not been modified. Utah R.Evid., Preliminary Note.

[33]It is an abuse of federal rule 607, in a criminal case, for the prosecution to call a witness that it knows will not give it useful evidence, just so it can introduce otherwise inadmissible hearsay evidence against the defendant. See e.g., *United States v Peterman*, 841 F.2d

employed as a guise for submitting to the jury substantive evidence that is otherwise unavailable." *United States v Gomez-Gallardo*, 915 F.2d 553 (9th Cir. 1990) [citation omitted].

In addition to this long standing rule, courts have also recognized that there is a greater risk of error when the evidence is a prior inconsistent statement containing an alleged unsworn admission of the defendant. As the Fourth Circuit in *United States v Ince*, stated, "[A] trial judge should rarely, if ever, permit the Government to 'impeach' its own witness by presenting what would otherwise be inadmissible hearsay if that hearsay contains an alleged confession to the crime for which the defendant is being tried." *Ince*, 21 F.3d at 581. The underlying premise of this rule is that the "notions of fairness upon which our system is based" mandate that "men should not be allowed to be convicted on the basis of unsworn testimony." *Id.* at 580.

To determine whether the government has an improper motive for calling a witness, the reviewing court must examine the record to see whether the government called the witness for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible. *Gomez-Gallardo*, 915 F.2d at 555, citing *United States v Hogan*, 763 F.2d 687, 702 (5th Cir. 1985); *Peterman*, 841 F.2d at 1479. It is the government's use of the evidence during the trial rather than any post-trial explanation that is relevant. *Gomez-Gallardo*, 915 F.2d at 555.

On appeal, an erroneous decision to admit or exclude evidence is grounds for reversal where the error is harmful. *State v Jaeger*, *supra*, 973 P.2d at 410.

In *Gomez-Gallardo*, the court condemned the government's trial tactic of calling a witness in order to introduce otherwise inadmissible evidence and reversed the defendant's

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1474, 1479 (10th Cir. 1988); *United States v Ince*, 21 F.3d 576 (4th Cir. 1994); *United States v Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986).

conviction.[34] Gallardo was on trial for conspiracy to distribute cocaine. In its case-in-chief, the government called as a witness Gallardo's alleged co-conspirator, knowing in advance that Gutierrez would testify falsely. When Gutierrez admitted his own participation in the cocaine deal, but denied Gallardo's, the government had three witnesses impeach Gutierrez's testimony and character. In closing, the government closely examined Gutierrez's testimony in urging the jury to reject all of it as false except for his admission of guilt.

Pinder's case is similar to *Gomez-Gallardo*. The prosecution, knowing in advance that DeHart was an adverse and hostile witness who would deny making the out-of-court statements to Cowles,[35] nevertheless subpoenaed DeHart to testify in its case-in-chief. Indeed, the prosecution's conduct in this case was particularly egregious in that it *forced* DeHart to testify through its prosecutorial power to give immunity. Once on the witness stand, the prosecution took great care to destroy DeHart's credibility by exposing to the jury her bias in favor of Pinder. DeHart was questioned about events that had already been testified to by several prosecution witnesses. After successfully attacking DeHart's credibility, the prosecution then went to the heart of its purpose in calling her as a witness, questioning her at length about whether she made the alleged prior statements to her daughter. All of this was done not because DeHart's testimony was essential to prove an element of the case against Pinder, but

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[34]Although trial counsel did not object at trial, the court found that the government's actions reached the level of plain error requiring reversal in part because the government's case was weak in that it lacked any physical evidence of the defendant's guilt and was based largely on the testimony of a co-defendant. 915 F.2d at 556.

[35]The State was not surprised by DeHart's denial of the alleged out-of-court statements to Cowles because DeHart had previously testified in this manner at her own trial, which was prosecuted by the lead prosecuting attorney in this case.

because DeHart's anticipated denials were a necessary precursor for the introduction of the Cowles and Knapp testimonies, which were not otherwise admissible.

Without DeHart's denials, there is no question that the introduction of this testimony would have violated the Confrontation Clause of the Sixth Amendment. In the recent case of *Crawford v. Washington*, 124 S.Ct.1354 (2004), the United States Supreme Court clarified that the Sixth Amendment prohibits the admission of out-of-court testimonial statements of witnesses who have asserted a valid privilege against testifying. Because Pinder had no prior opportunity to cross-examine DeHart, her out-of-court statements clearly would not have been admissible at trial had she not been given immunity by the prosecution and forced to testify.

That the prosecution had an improper purpose in calling DeHart is evidenced by the prosecution's reliance on her testimony in closing argument. Rather than arguing that DeHart offered material, credible evidence of Pinder's guilt, the prosecution attacked her loyalty to Pinder, mocked her direct testimony, and then relied heavily on the testimony of the witnesses called to rebut her, arguing that it was some of the most compelling evidence of Pinder's guilt.

Not only did the entire process of calling DeHart and the rebuttal witnesses result in improper bolstering, confusion of the issues, undue delay and waste of time, and the needless presentation of cumulative evidence, but this illegitimate prosecutorial tactic was particularly harmful because some of the otherwise inadmissible evidence contained the alleged admissions of Pinder. See *Ince*, 21 F.3d at 581.

Although the Utah Rules of Evidence permit the introduction of prior inconsistent statements for both impeachment and substantive evidence, see Utah R.Evid. 801(d)(1)(A), this distinction is not relevant. The error complained of here is that the prosecution called a witness

with the knowledge that she would deny making certain statements, and that by doing so would open the door to testimony which would have been inadmissible under the Sixth Amendment Confrontation Clause as well as the rules of evidence had DeHart been unavailable to testify.[36] Under this particular set of facts, it is fundamentally unfair to allow the prosecution to engage in bootstrapping by calling a witness not for any positive testimony she could be expected to give, but for the sole purpose of bringing about rebuttal testimony that the prosecution knows is not independently admissible.

The aim of the prosecution in calling DeHart was to secure the otherwise inadmissible testimony so the jury could find Pinder's guilt from that testimony. It is fundamentally unfair to allow the State to exploit both its prosecutorial powers and the rules of evidence in this manner. Since the error included alleged admissions to the murders, its introduction cannot be considered harmless, and reversal is required.

3. The Admission of This Testimony Violated Rule 403 of the Utah Rules of Evidence

Finally, the trial court erred because it never directly ruled on the rule 403 objection that the prejudice of Cowles' testimony outweighed the probative value of the evidence. The

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[36]Even under the Utah Rules of Evidence, this Court has noted that while prior inconsistent statements might be substantive evidence, "not all substantive evidence is of equal probative value." *State v Ramsey*, 782 P.2d 480, 483 (Utah 1989) [holding that out-of-court statement denied at trial is insufficient by itself to sustain a conviction]. In the sentencing context, where hearsay itself is admissible, this Court has held that "double hearsay is so inherently unreliable and presents such a high probability for inaccuracy that it cannot stand alone as the basis for sentencing." *State v Johnson*, 856 P.2d 1064, 1071 (Utah 1993); *United States v Fernandez*, 892 F.2d 976, 984 (11th Cir. 1989)["experience suggests an inverse relationship between the reliability of a statement and the number of hearsay layers it contains."].

testimony of DeHart and Cowles was so unreliable and prejudicial as to be inadmissible under rule 403.

First, because it was necessary for DeHart to testify before Cowles' testimony became admissible, the jury was subjected to unnecessary testimony. DeHart's testimony was almost wholly cumulative and/or pertinent to matters that were collateral to the issue of whether Pinder shot and killed Tanner and Flood. Indeed, the prosecution spent a considerable amount of time questioning DeHart about events already covered by other prosecution witnesses, such as Shirley and David Brunyer and Filomeno Ruiz. Thus, much of DeHart's testimony merely repeated what other witnesses stated, and in its substance was not critical to the prosecution's case.

Second, Cowles testified that her mother made contradictory statements about Pinder's statements: 1) that Pinder said he shot the couple, 2) that Ruiz had murdered someone, and 3) that Ruiz and Brunyer shot the couple and Pinder was innocent. Cowles also testified that her mother was an unreliable witness because DeHart tended to not tell the truth. (R1781: 103-114.) Thus, not even the recipient of the unsworn out-of-court statements, who was the daughter of the declarant, could vouch for the trustworthiness of the statements. Nevertheless, Cowles' statements were admitted to prove Pinder's guilt even though there was no way to ensure that Pinder himself even made the alleged statements.

Finally, it is important to reiterate that the source of everything Cowles testified to was hearsay and was inadmissible but for DeHart's compelled testimony. Cowles was not a percipient witness and had no first hand knowledge of the activities of her mother or Pinder. To allow her testimony to be utilized as substantive evidence of Pinder's guilt is unduly

prejudicial given the unreliability of the statements and the danger of confusing and misleading the jury. Thus, even if Cowles' testimony was technically admissible evidence, this Court should have excluded the evidence under rule 403 as more prejudicial than probative.

B. Bernie Knapp and Damien Cowles' Testimony

The trial court similarly erred in admitting, over objection,[37] the testimony of Bernie Knapp and Damien Cowles regarding DeHart's statements about her own actions in Idaho. Damien Cowles testified that he was present when DeHart told Melissa that she had cleaned out the truck, burned some clothing, and was planning to throw away a gun belonging to Pinder. (R1781: 135-136.) Bernie Knapp testified that DeHart told him that she had helped clean out a truck, thrown away clothing, and that two "druggies" had been shot and their bodies blown up. (R1781: 140-141.)

At trial, counsel objected to this testimony as improper bolstering and as cumulative and prejudicial. (R1781: 117-121.) In his motion for new trial, Pinder specifically cited 403 of the Utah Rules of Evidence. (R1170-1229.) The trial court incorrectly held that the objection raised in the motion for new trial had not been raised by trial counsel, and this issue was thereby waived. (R1738.) Despite the court's finding of waiver, this issue is nevertheless preserved for appeal, both at trial and on the motion for new trial. *State v Jaeger*, 973 P.2d at 408.

The prejudice suffered by Pinder from the introduction of this evidence substantially outweighed its probative value. This conclusion is evidenced by the fact that Knapp's and Cowles's testimonies were not relevant to the issue of whether Pinder shot and killed Flood and

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[37]Objection to this evidence was based upon relevancy and prejudice grounds under Rule 403 of the Utah Rules of Evidence. (R1781: 116-121.)

Tanner. Instead, their testimony tended to prove only that DeHart was lying when she denied making these out-of-court statements. Notwithstanding this fact, the prosecution argued during closing that DeHart's alleged statements, testified to by Knapp and Damion Cowles, were *conclusive* evidence that Pinder murdered Flood and Tanner. This assertion was particulalry prejudicial as it was both inaccurate and highly misleading. The prosecution relied heavily on Knapp's early knowledge that the vicitms had been shot to argue that Knapp could have known this only if Pinder had shot the couple and then told DeHart. In actuality, however, even if DeHart made the alleged statements to Knapp and Damien, the statements can be explained by the fact that Pinder became aware of the killings after they occurred and assisted Ruiz in cleaning up the evidence of the murders.

Moreover, the melodramatic manner in which the prosecution was permitted to introduce this evidence, by attacking DeHart's credibility, heightened the prejudicial impact of this testimony because both Knapp and Damion Cowles could not have been called as witnesses without DeHart's forced testimony (see argument above). By permitting the prosecution to introduce this testimony in order to contradict its own witness – who happened to be Pinder's girlfriend – the trial court unfairly permitted the prosecution to improperly bolster its case with the not so subtle inference that DeHart lied on the witness stand to cover up Pinder's guilt.

Finally, both Knapp and Damion Cowles' testimonies duplicated Melissa's testimony that her mother made certain out-of-court statements at trial which she denied making; thus, their testimony was both cumulative and bolstering.

Because the trial court erred in allowing the prosecution to improperly bolster its witnesses and to introduce evidence that was only marginally relevant to the issue of Pinder's

guilt, but was extraordinarily prejudicial to Pinder, the trial court erred in allowing the introduction of this evidence.

C. Brunyer's Extrajudicial Statements Were Improperly Admitted

Following the testimony of David Brunyer, the prosecution was permitted, over objection, to introduce both the testimony of Andrea Brunyer and her prior written statements memorializing Brunyer's purported prior out-of-court statement to her. The trial court held that by virtue of asking Brunyer whether he had been charged in this case, the defense raised the issue of improper motive and paved the way for the admission of the evidence as prior consistent statements under 801(d)(1)(B).[38] (R1775: 179-180.) The court also stated that the admissibility of Brunyer's statements was not an issue of credibility: "If it's solely an issue of credibility it may not come in." (R1775: 179.) The admission of this evidence was error.

1. Brunyer's Statements to Andrea Were Not Admissible as Prior Consistent Statements Under URE Rule 801(d)(1)(B)

Rule 801(d)(1)(B) of the Utah Rules of Evidence is identical to the federal rule on prior consistent statements. Utah courts "look 'to the interpretations of the federal rules [of evidence] by the federal courts to aid in interpreting the Utah rules . . . .'" *State v Vargas*, 2001 UT 5, 20 P.3d 271 (Utah 2001).

In *United States v Tome*, 513 U.S. 150 (1995), the United States Supreme Court held that Federal Evidence Rule 801(d)(1)(B) permits the introduction of a declarant's consistent out-of-court statement to rebut a charge of recent fabrication or improper influence or motive *only*

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[38]Rule 801(d)(1)(B) of the Utah Rules of Evidence provides that a prior consistent statement which is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive is not hearsay.

when those statements were made *before* the charge of recent fabrication or the acquisition of the improper influence or motive:[39]

> Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited . . . . The Rule speaks of a party rebutting an alleged motive, not bolstering the credibility of the story told.

U.S. v Tome, 513 U.S. at 157-158.[40]

Pursuant to *Tome*, the party offering the statement must establish four elements under Rule 801(d)(1)(B):

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.

United States v Collicott, 92 F.3d 973, 979 (9th Cir. 1996).

Since the ruling in *Tome*, several federal courts have held that it is error to admit the consistent post-arrest statements of a witness who was a participant in the crime, because the co-participant witness's motive to fabricate arose as soon as he was arrested. See e.g., ; *United*

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[39]The Supreme Court resolved a split among the circuits in the interpretation of rule 801(d)(1)(B) by reversing the ruling of the Tenth Circuit, which had held that the "pre-motive requirement [was] a function of the relevancy rules, not the hearsay rules" and that as a "function of relevance, the pre-motive rule is clearly too broad . . . because it is simply not true that an individual with a motive to lie always will do so." The Supreme Court also rejected the government's contention that an out-of-court consistent statement should be admissible – whenever it was made – because it tends to bolster the testimony of a witness and so tends also to rebut an express or implied charge that the testimony has been the product of an improper influence.

[40]See also, *Breneman v Kennecott Corp.*, 799 F.2d 470, 473 (9th Cir. 1986) ["mere contradictory testimony cannot give rise to an implied charge of fabrication."]

States v Albers, 93 F.3d 1469 (10th Cir. 1996); *United States v Esparza*, 291 F.3d 1052, 1054-1055 (9th Cir. 2003); *United States v Forrester*, 60 F.3d 52 (2d Cir. 1995); *United States v Riddle*, 103 F.3d 423 (5th Cir. 1997); *United States v Collicott*, *supra*, 92 F.3d 973; *United States v Moreno*, 94 F.3d 1453 (10th Cir. 1996). Generally, the determination of whether a witness had a motive to fabricate prior to the consistent statement is a question to be decided on a case by case basis. See *United States v Prieto*, 232 F.3d 816 (11th Cir. 2000) and cases cited therein.

In the instant case, Brunyer's motive to fabricate arose as soon as he assisted with the homicides. Once he participated in the killings and the cover-up, he had a motive to try to allocate the blame on someone other than himself and to minimize his own involvement. See e.g., *U.S. v Esparza*, 291 F.3d at 1054-1055 [trial court did not err in excluding defendant's statement to police when he was stopped at a truck stop that he did not know drugs were in his truck – finding that defendant had the same motive to lie to investigating police officer as he did at trial]; *United States v Bao*, 189 F.3d 860 (9th Cir. 1999) [defendant under investigation had motive to lie to reporter even though he was not yet under arrest]; *United States v Albers*, 93 F.3d 1469, 1482 (10th Cir. 1996) [statements made when witness had motive to lie inadmissible, but harmless under the facts of the case]; *United States v Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989) [noting that a criminal suspect's motive to fabricate exculpatory testimony is strong when under criminal investigation]; but compare *U.S. v Prieto*, *supra*, 232 F.3d 816 [co-defendant turned state's witness had no motive to lie during post-arrest interrogation because his statement was voluntary and promises had not yet been made to him by law enforcement.]

Brunyer, by his own admissions, aided Ruiz in destroying evidence by ridding the couple's house of finger prints, burning the telephone, and picking up body parts. His

participation in these illegal activities occurred before his self-serving statements to his daughter, and his motive to cover-up his culpability arose once he committed himself to the destruction of evidence. Accordingly, any consistent out-of-court statements Brunyer made after he finished picking up body parts at the Lake Canyon site were made after he acquired a motive to lie and cannot be admitted as substantive evidence under 801(d)(1)(B). Additionally, based on the evidence presented at the hearing on the new trial motion, it appears that Brunyer actually participated in killing the couple and therefore had the even greater incentive to fabricate his statements to Andrea.

At trial, the State relied on *State v Speer*, 718 P.2d 383 (Utah 1986) and *State v Loose*, 2000 UT 11, 994 P.2d 1237, in arguing for admission of Brunyer's statements. (R1777: 163-180.)

In *Speer*, the Utah Supreme Court held that 801(d)(1)(B) permitted admission of the child victim's consistent-out-of-court statements to her mother, the initial investigating officer, and a police detective in charge because defense counsel impeached the child with her inconsistent preliminary hearing testimony, and the child admitted that she had made up part of her preliminary hearing testimony.

In *Loose*, the Court similarly held that 801(d)(1)(B) permitted the admission of a child victim's consistent statements contained in a letter written prior to trial because defense counsel had impeached her with inconsistent statements from the same letter.

In neither of these cases does this Court address the requirement that the prior consistent statement precede the motivation to lie. This Court concluded that 801(d)(1)(B) allows the state to rehabilitate its witness with consistent out-of-court statements whenever the witness's

credibility is challenged by the defense. The broad holdings of *Loose* and *Speer* directly conflict with *Torre* and should be re-examined. Moreover, it appears that these cases may have confused admissibility of prior consistent statements under the rules of evidence with the common law doctrine of rehabilitating the credibility of a witness (see *United States v Lozada-Rivera*, 177 F.3d 98 (1st Cir. 1999) [noting that an unresolved dilemma exists concerning the extent to which 801(d)(1)(B) and *Torre* altered preexisting common law standards governing rehabilitative use of prior statements].)

For example, *Speer* cites to *State v Asay*, 631 P.2d 861, 864 (1981), for its authority. *Asay* was decided before Utah's adoption of the Federal Rules of Evidence and relies on rule 63(1)(c) of the former Utah Rules of Evidence in allowing the prior consistent statement of an impeached police officer. That ruled permitted admission "if it will support testimony made by the witness at trial when such testimony is challenged." *Asay*, 631 P.2d at 864.

Loose relies on *State v Sibert*, 310 P.2d 388, 392 (Utah 1957), in holding that 801(d)(1)(B) allows evidence of prior consistent statements because "when evidence of inconsistent statements has been introduced, or insinuations made by cross-examination that such inconsistent statements were uttered, it comports with reason and experience to admit prior consistent statements to rebut any inference that the witness was telling a recently fabricated story." *Loose*, 994 P.2d at 1240, citing *Sibert*, at 392. *Sibert* was decided long before Utah adopted the Federal Rules of Evidence and is based on the common law doctrine of rehabilitation.

The State relied exclusively on 801(d)(1)(B) in arguing the admissibility of Brunyer's out-of-court statements. Thus, *Sibert*, *Asay*, and the common law doctrine of rehabilitation are

inapplicable. Moreover, the reasoning in *Loose* and *Speer*, which rely on *Sibert* and *Asay*, is flawed. Under the correct analysis set forth in *Torre*, Brunyer's extrajudicial statements are inadmissible hearsay, and it was error to allow the jury to consider this evidence.

2. Andrea Written Summary of Brunyer's Statements Was Not Admissible as a Prior Consistent Statement by Brunyer Under URE Rule 801(d)(1)(B)

Given that Brunyer's statements to his daughter are hearsay, not falling within any exception, it inexorably follows that his daughter's written summary of her father's out-of-court statements is hearsay upon hearsay.[41]

First, it was error to admit Andrea's written summary because the statements it contained did not fall under 801(d)(1)(B), see *United States v Forrester*, *supra*, 60 F.3d 52 [*Torre* rationale applies to the introduction of a document where the statements contained in the document were relied on to rebut the inference that the witness was making up her story].

Second, it was error to admit the summary because it was unreliable. According to Andrea, who was fifteen years old at the time, she took notes while her father recounted the events of the day and then later transcribed her notes in her own words into complete sentences with punctuation. Moreover, according to her trial testimony, she did not incorporate all of her notes into the final written statement. Consequently, the written summary is the product of a frightened, young girl's second hand interpretation of events that were recounted to her by her father, who was laboring under great incentive to distort the truth to serve his own interests.

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[41] Additionally, since Andrea and Brunyer did testify, Andrea's notes about her conversation with her father are inadmissible under the rationale in *Sibert*, where the admission of the police officer's notes was held to be prejudicial error.

Because it was improper under rule 801(d)(1)(B) to admit Brunyer's extrajudicial statements in any form, the trial court erred in admitting this evidence.

D. Conclusion

When considering that there was an absence of physical evidence of Pinder's guilt and that the prosecution's case was founded in large part on the highly suspect testimony of Ruiz and Brunyer, in conjunction with the impact of newly discovered evidence of Pinder's innocence, the trial court's evidentiary rulings cannot be deemed harmless. Accordingly, Pinder's conviction must be reversed.

IV. THE JURY INSTRUCTION ON COMPULSION VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY IMPROPERLY REDUCING THE STATE'S BURDEN OF PROOF

Without objection from the defense, the trial court gave the jury an instruction on the defense of compulsion which was directed only to Counts 8-10. Instruction number 57 defined the defense of compulsion as follows:

> It is a complete defense to a criminal charge that a defendant acted under compulsion. This defense has been raised regarding Count 8, Possession of an Explosive Device, Count 9, Abuse or Desecration of a Dead Human Body, and Count 10, Abuse or Desecration of a Dead Human Body. Compulsion under the law is when an individual engages in criminal conduct because he is coerced to do so by the use or threatened imminent use of unlawful physical force upon himself or a third person, which force or threatened force a person of reasonable firmness would not have resisted. An event is "imminent" if it is about to occur or likely to occur at any moment.
>
> Once the defense of compulsion is raised by some evidence, the burden of disproving the defense is on the State. If the State does not meet its burden, the defendant is entitled to an acquittal.
>
> The defense of compulsion is not available to a person who intentionally, knowingly, or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

It is conceded that this Court may review the correctness of this instruction solely on the basis of "manifest injustice" as there was no objection raised below. Utah Rules of Crim. Pro., Rule 19(c).

This instruction was erroneous on two distinct grounds: 1) the instruction fails to inform the jury that the State has the burden of disproving the affirmative defense beyond a reasonable doubt; and 2) the instruction requires a defendant to admit all the elements of the offense to assert the defense thereby shifting the burden to the defendant in violation of defendant's right to due process and equal protection of law.

Utah law is clear that once an affirmative defense has been raised the jury must be informed that the prosecution retains the burden to disprove an affirmative defense beyond a reasonable doubt. For example, if self-defense has been raised, the prosecution "has the burden to prove beyond a reasonable doubt that the killing was not in self-defense." *State v Knoll*, 712 P.2d 211, 214 (Utah 1985).

In describing the trial court's duty to instruct on the defense of withdrawal, another affirmative defense, this Court has stated:

> The proper course would be for the court to explicitly state that the defendant has no particular burden of proof on the issue of withdrawal and that the question is whether, taking all the evidence on the issue into account, the State has shown *beyond a reasonable doubt* that the defendant has not withdrawn from the commission of the offense and that he is guilty of the offense charged. [Citations omitted.]

State v Hansen, 734 P.2d 421, 428-429 (Utah 1986) [emphasis added].

In *State v Garcia*, 2001 UT App 19, 18 P.2d 1123, the Court of Appeals held that it was plain error for a trial court to fail to instruct the jury that "the State must disprove self-defense,

and other affirmative defenses, beyond a reasonable doubt." The necessity of instructing the jury specifically about the relationship between an affirmative defense and reasonable doubt was again reiterated:

> The problem in the jurors' minds was that the burden of proof required for affirmative defenses is counter-intuitive. The State is required in this instance to disprove the affirmative proposition of self-defense, not just prove guilt, beyond a reasonable doubt. This counter-intuitive nature of thinking about self-defense and other affirmative defenses produces the need for special jury instructions. When the defendant has reached the threshold to merit self-defense instructions, those instructions must clearly communicate to the jury what the burden of proof is and who carries the burden. *Trial courts should separately instruct each jury clearly that the State must disprove self-defense, and other affirmative defenses, beyond a reasonable doubt.*

Id. at ¶ 16 [footnote omitted][emphasis added].

While the instruction here does mention that the State has the burden, the instruction fails to "explicitly" inform the jury that this burden must be beyond a reasonable doubt. This requires reversal of Counts 8, 9 and 10.

It has long been established that the burden of proof must remain upon the State throughout trial and that an improper shifting of that burden denies a defendant his right to due process of law under the Fourteenth Amendment of the United States Constitution. *Sandstrom v Montana*, 442 U.S. 510 (1979). While a defendant may be required to show some evidence of an affirmative defense in order to warrant an instruction, the burden to prove the charge beyond a reasonable doubt remains with the State. Since the defendant has a constitutional right to present a defense, *Chambers v Mississippi*, 410 U.S. 284, 302 (1973), courts have routinely held that a defendant has a concurrent right to rely on inconsistent defenses. See, e.g., *State v Mitcheson*, 560 P.2d 1120 (Utah 1977).

In comparing the compulsion defense to the entrapment defense in Utah, it becomes clear that entrapment may be relied upon as a defense even if the defendant denies committing the offense, while the compulsion defense may not. See, Utah Code Ann. §§76-2-302 and 76-2-303. Since the State cannot deny a defendant his right to equal protection of law, it is a denial of this right to permit inconsistent defenses in entrapment cases but not in compulsion cases. Therefore, the language of the code section and the instruction which limits the compulsion defense to situations where the defendant has admitted all the elements of the charge violated the due process and equal protection clauses of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the convictions in this matter and remand for a new trial.

Dated this 22nd day of April, 2004

Andrew Parnes
Brent Gold
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Andrew Parnes, hereby certify that I am employed in the County of Blaine, Idaho; I am over the age of eighteen years and not a party to this action; my business address is 160 Second Street East, Ketchum, Idaho 83340; on April 23, 2004, I served two true and correct copies of a Brief of Appellant in the above captioned matter to the following person in the manner noted:

Laura B. Dupaix
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114
Fax: 801-366-0167

X By depositing a copy of the same in the United States mail, postage prepaid, at the post office at Ketchum, Idaho.

____ By hand delivering a copy of the same to the office of the attorney at her office in Salt Lake City, Utah.

____ By sending a facsimile copy of the same to said attorney at her facsimile number.

Andrew Parnes

ADDENDUM A

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah State Constitution, Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Utah Rules of Evidence, Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah Rules of Evidence, Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

Utah Rules of Evidence, Rule 801. Definitions.

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ADDENDUM B

IN THE FOURTH DISTRICT COURT OF THE STATE OF UTAH WASATCH COUNTY

STATE OF UTAH,	:	
Plaintiff,	:	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING MOTION FOR NEW TRIAL**
vs.	:	Criminal No. 991500190
JOHN R. PINDER , DOB: 11/10/57	:	
Defendant.	:	Judge Lynn W. Davis

The Court heard the trial of this case which commenced on June 26, 2000, and concluded with a unanimous guilty verdict on August 2, 2000, on all eleven (11) counts and all special issues. The penalty phase of the capital charges concluded on August 4, 2000, with a sentencing decision of life in prison with the possibility of parole. The Court announced sentence on the remaining counts on June 12, 2001. The defendant filed a motion for a new trial on June 21, 2001.

RECENT PROCEDURAL HISTORY

Since the presentment of the motion for a new trial, this Court has received the following

pleadings, documents and correspondence:

DATE	DOCUMENT OR PLEADING	PARTY
August 29, 2001	Letter informing the Court of the status of the State's response and agreement of the parties to grant the State additional time to respond	State of Utah
September 6, 2001	State's Memorandum Opposing Motion for New Trial	State of Utah
September 11, 2001	Letter to the Court regarding Ron Yengich's distribution to the State of a transcript made under seal on August 1, 2001.	John R. Pinder
September 17, 2001	Letter to the Court in response to letter regarding Ron Yengich's distribution to the State of a transcript made under seal on August 1, 2001.	Ronald Yengich (former counsel for John Pinder)
October 17, 2001	Motion to Quash Defendant's Subpoena Duces Tecum	State of Utah, through its counsel David E. Yocom, Salt Lake County District Attorney and B. Kent Morgan, Assistant Justice Division Administrator
November 20, 2001	Motion for Partial and Temporary Closure of Hearing	John R. Pinder
November 20, 2001	Motion and Order to Seal Order to Produce	State of Utah
November 21, 2001	Motion for Withdrawal of Scott W. Reed and Substitution of C.C. Horton	State of Utah

November 27, 2001	State's Response to Defense Motion for Partial and Temporary Closure of Hearing	State of Utah
November 28, 2001	Reply Memorandum Re Motion for New Trial	John R. Pinder
December 17, 2001	Motion for Limited Intervention of Deseret News Publishing Company, publisher of the Deseret News, and the Utah Headliners Chapter of the Society of Professional Journalists	Intervenors Deseret News, Et al.
December 17, 2001	Memorandum in Opposition to Defendant's Motion for Partial and Temporary Closure of Hearing	Intervenors Deseret News, Et al.
December 17, 2001	Notice of Appearance and Request for Notice of Motions to Close or Seal Judicial Proceedings or Records	Intervenors Deseret News, Et al.
December 18, 2001	Notice of Appearance and Joinder of Bonneville International Corporation d/b/a KSL-TV In Media Intervenors' Memorandum in Opposition to Motion for Partial and Temporary Closure of Court Hearing	Intervenor Bonneville International Corporation d/b/a KSL-TV
December 18, 2001	Withdrawal of Motion for Temporary Closure of Hearing	John R. Pinder
March 27, 2002	Motion for Partial Closure of Hearing and Sealing of Documents	State of Utah

July 18, 2002	Letter to the Court regarding the Press' interest in maintaining an open court	Intervenors, Deseret News, Et al.
July 26, 2002	Sealed Affidavit of Counsel Re Temporary Closure of Hearing	John R. Pinder
September 27, 2002	Stipulation re: Testimony of Christina Moellmer **(Filed Under Seal)**	
September 27, 2002	Stipulation re: Testimony of LeAnn Hill **(Filed Under Seal)**	
September 27, 2002	Stipulation re: Testimony of Gene Michael Kelly **(Filed Under Seal)**	
September 27, 2002	Stipulation re: Testimony of Gene Michael Kelly	
September 27, 2002	Stipulation re: Testimony of LeAnn Hill	
September 27, 2002	Stipulation re: Testimony of Christina Moellmer	
abt December 16, 2002	State's Memorandum Opposing Defense Arguments and Evidence Concerning Andrea Brunyer **(Filed Under Seal)**	State of Utah
December 20, 2003	Substitution of Counsel	State of Utah (Cleve J. Hatch as new Duchesne County Attorney replacing Herbert Wm. Gillespie)
January 6, 2003	State's Supplemental Memorandum Concerning Andrea Brunyer **(Filed Under Seal)**	State of Utah

January 7, 2003	Stipulation and Protective Order for Examination of Protected Records of the State of Utah Department of Corrections	
February 18, 2003	Notice of Withdrawal of Specified Claims in Motion for New Trial	John R. Pinder
abt February 18, 2003	Memorandum Re Evidence Concerning Andrea Brunyer **(Filed Under Seal)**	John R. Pinder
March 10, 2003	Supplemental Memorandum Re Motion for New Trial	John R. Pinder
March 10, 2003	State's Final Supplemental Brief on Motion for New Trial	State of Utah
abt March 26, 2003	State's Draft of Proposed Findings of Fact, Conclusions of Law and Order Denying Motion for New Trial	State of Utah
abt March 28, 2003	Defendant's Proposed Findings of Fact and Conclusions of Law	John R. Pinder

Several factors led to significant delays in these proceedings. Defendant initially claimed ineffective assistance of counsel. Efforts were made to coordinate available hearing dates to receive testimony from defendant's former counsel, Ronald Yengich and Earl Xaiz. Hearing dates were postponed and pushed back when Mr. Yengich and Mr. Xaix became unavailable. These scheduling procedures became unnecessary when defendant dropped his ineffective assistance of counsel claim on February 18, 2003.

Other delays arose as a result of the unavailability of witness Joey Silva. At one point, Mr.

Silva desired to testify after his release from prison. Upon his release, however, Mr. Silva absconded. While Mr. Silva was a fugitive from justice, he was unavailable to testify. Mr. Silva only became available to testify when he was incarcerated for violation of parole. Still further delays stemmed from motions to close portions of the proceedings. As a result of these requests, various representatives of the press intervened and filed motions and arguments regarding the importance of maintaining an open court.

The Court has considered the defendant's motion for a new trial, the memorandum supporting that motion, the State's response, stipulations and other memoranda filed by both parties, the Court's notes and the prepared transcripts of witnesses' testimony, the exhibits presented at numerous evidentiary hearings, and the oral arguments on the defendant's motion. Both parties have submitted the matter for decision. At the close of oral arguments on March 13, 2003, the Court invited counsel for each side to submit Findings of Fact, Conclusions of Law and Order. The Court has received and carefully examined proposed Findings of Fact, Conclusions of Law and Order from each side. Because the Court denies the motion for new trial, the Court has adopted, with some significant modifications the proposed pleading submitted by the State of Utah.

I. A. GENERAL FINDINGS OF FACT

1. The prosecution provided to the defense counsel a duplicate of the prosecution's files in this

case totaling 5,604 pages of information, together with a courtesy copy of the prosecution's index to that file. The prosecution maintained an "open file" policy.

2. According to the testimony of the defense investigator, Mr. Gary Potter, which the Court finds credible, defense counsel periodically asked the prosecution to provide some additional information not in the prosecution's files. The prosecutors consistently obtained the additional requested information and provided it to the defense.

3. The defense never complained about discovery either before or during trial.

I. B. GENERAL CONCLUSIONS OF LAW

1. The State has a duty to provide to the defense evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment.

2. In order to constitute grounds for a new trial based on a discovery violation the defense has the burden of showing (a) the state suppressed information; (b) the information remained unknown to the defense both before and throughout the trial and (c) the information is material and exculpatory, meaning its disclosure would have created a reasonable probability that the result of the trial would have been different. If the information that is the subject of an alleged discovery violation actually comes out at trial, the State cannot be said to have withheld exculpatory information. *State v. Bisner*, 2001 UT 99, 37 P.3d 1073.

3. The prosecution does not have a duty to provide information in discovery which it does not

possess nor intend to use. Nor does the prosecution have a duty to search through other agencies' files to see if there is relevant or even exculpatory evidence even if the prosecution could have access to such information under the Government Records Access and Management Act. *State v. Spry*, 2001 UT 75, 21 P.3d 675.

4. Had the defendant alleged ineffectiveness of counsel, he would have had to rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy. *State v. Litherland*, 2000 UT 76 ¶ 19. Here the defendant has withdrawn his claim of ineffectiveness of counsel, so there is even more reason to have a strong presumption that a challenged action might be considered sound trial strategy.

5. In order to constitute grounds for a new trial based on newly discovered evidence, the defense has the burden of showing (a) the evidence must be such as could not with reasonable diligence have been discovered and produced at the trial; (b) it must not be merely cumulative and (c) it must be such as to render a different result probable on the retrial of the case. *State v. James*, 818 P.2d 781 (Utah 1991).

6. Newly discovered evidence does not warrant a new trial where its only use is impeachment. *State v. Boyd*, 2000 UT 30.

7. Upon being presented with newly discovered evidence that is not merely cumulative, this Court must consider the testimony's probable weight and the likelihood that a jury would find it credible considering the interplay with the substance of the proffered testimony and with the other

evidence offered at the first trial. *State v. Loose,* 2000 UT 11. *Loose* dealt with recantation of testimony–a claim not alleged in the present case. Notwithstanding this, the Court adopts the general legal standard announced in *Loose*, and recognizes the standard of care which must be applied in cases which will exclude such evidence from a jury. The trial court cannot act with broad and "sweeping discretion" and must act with caution in weighing of credibility which may result in keeping otherwise admissible evidence from the jury. The trial court, in the context of a new trial motion based upon newly discovered evidence, must consider the testimony's probable weight as part of the determination as to whether that testimony would "make a different result probable on retrial." Part of that weight certainly is the likelihood that a jury would find it credible. Probable credibility alone is not the determinative issue, but its interplay with the substance of the proffered testimony and with the other evidence offered at trial is.

8. The defense bears the burden of persuasion. *State v. Boyd*, 2000 UT 30 ¶ 27.

II. THE DEFENDANT'S COMPLAINTS WITH THE COURT'S EVIDENTIARY RULINGS

The defendant complains that the Court erred by allowing the admission of David Brunyer's prior consistent statement made to Andrea Brunyer and her written memorandum which David Brunyer read to the police verbatim. He has raised a new theory for this objection neither raised nor argued at trial. For the reasons in the State's Memorandum Opposing Motion for New Trial at pages 25 to 33, the Court finds the objection is not timely and has been waived.

The defendant complains of the Court's ruling concerning Barbara DeHart's foundation for Melissa Cowles' testimony. This is simply a disagreement with a ruling of the Court and should be addressed on appeal. This challenge does not form the basis for a new trial.

The defendant also presents new objections regarding evidentiary rulings concerning the testimony of Bernie Knapp and Damien Cowles. For the reasons in the State's Memorandum Opposing Motion for New Trial at pages 26 to 39, the Court finds the objections have been waived. Again, this challenge does not form the basis for a new trial.

The defendant complains about Jury Instruction number 57. The Court notes that no objection was raised to the jury instruction at trial. To the contrary, the defendant stipulated to this instruction. The objection is untimely, has been waived, and does not form the basis for a new trial.

III. THE ALLEGED DISCOVERY VIOLATION CONCERNING THE SKIDMORE MURDER / INCIDENT

The defendant alleges that Filomeno Ruiz was "involved" in the murder of Todd Skidmore, which occurred in Rio Blanco County, Colorado, in 1997, and that the prosecution withheld information from the defense concerning Mr. Ruiz's involvement in that murder. The Court enters the following:

FINDINGS OF FACT

1. Mr. Skidmore was murdered in Rio Blanco County, Colorado, in 1997, after being forcibly

taken there from Uintah County, Utah. Duchesne County and Uintah County border each other and Uintah County borders the State of Colorado.

2. While Mr. Ruiz is reported to have threatened Mr. Skidmore several days before Mr. Skidmore's murder, the court has no evidence before it that Mr. Ruiz either participated directly in Mr. Skidmore's murder or that he aided, assisted, or ordered that murder, or even knew it was going to occur.

3. The documents the defendant has attached to his memorandum reveal that Skidmore was kidnapped from Jennifer Floyd's trailer by three individuals. Jennifer Floyd was interviewed by the Rio Blanco, Colorado County Sheriff and investigators from the Glenwood Springs, Colorado District Attorney's Office on September 10, 1997. (See tab 4 of the defendant's attachments.) Statements made by the participants in the Skidmore murder corroborate Floyd's statement of what happened. Filo Ruiz was not present at all, nor did any of the participants implicate him in Skidmore's kidnapping or murder. Three people were eventually charged with the murder of Mr. Skidmore. None of the three was Mr. Ruiz. Two of the three were convicted in Rio Blanco County, Colorado while the third remains at-large.

4. The only involvement of Uintah County officials was to investigate the events in Uintah County and to facilitate the extradition to Colorado of the two individuals who were eventually convicted of Mr. Skidmore's murder. Ken Wallentine, a Deputy Uintah County Attorney, was assigned to assist the Colorado authorities in gaining the extradition to Colorado of the suspected

killers. An Assistant Attorney General, Mark Burns, participated in a conference call concerning those extraditions only to the extent of giving an opinion that the extradition papers were in order.

5. The Uintah County files concerning the Skidmore murder were not collected by the Duchesne County investigators in connection with the investigation into the murders of Rex Tanner and June Flood which occurred in Duchesne County. But a Duchesne County investigator did make an inquiry concerning Mr. Ruiz's connection to the Skidmore murder and learned that the Uintah County authorities concluded that Mr. Ruiz could not be linked to the murder of Mr. Skidmore. (Emphasis added).

6. The trial record contains an express acknowledgment from the defendant that he had received everything to which he was entitled by discovery, and that there were no outstanding discovery requests or discovery challenges. (Transcript Scheduling Conference, Sept. 24, 1999, p.7, lines 16-23). On February 26, 1999, the prosecution provided Mr. Ronald Yengich, one of the defendant's lawyers, with page 3561 of the discovery file. The document is a summary of an interview with Mike Sweat who was called as a defense witness at trial. That document informed the defendant that the Uintah County Sheriff's Office concluded that "Mr. Ruiz couldn't be linked to the murder of Skidmore." Finally, the document advised that additional information concerning the matter could be obtained from the authorities in Colorado. In addition, the document notes the suspicions of the Uintah County Sheriff's Office concerning Ruiz's possible involvement in the "Mexican Mafia." (Emphasis added).

7. Mr. Gary Potter is a licensed private investigator and former law enforcement officer. He was the private investigator who worked with the defendant's attorneys, Mr. Yengich and Mr. Xaiz. Before being engaged to work for the defense in this case, Mr. Potter had worked for Mr. Gold, who is currently one of the defendant's attorneys. Mr. Gold had asked Mr. Potter to investigate the Skidmore murder, as Mr. Gold was at that time counsel for Gerardo Cardenas Perez, also known as "Lalo," one of the three people who were charged with Mr. Skidmore's murder.

8. Mr. Potter was aware of rumors that Mr. Ruiz might somehow be linked to the murders. Prior to the trial in this case, Mr. Potter investigated those rumors and interviewed several people, including Filomeno Ruiz. Prior to the trial of this case, Mr. Potter provided to Mr. Yengich the report that Potter had prepared for Mr. Gold and the additional information from Potter's investigation, including the follow-up interviews concerning the Skidmore murder. The defendant's counsel was aware of this information both before and during the trial. Mr. Potter was unable to link Filomeno Ruiz to the Skidmore murder.

9. Mr. Ron Yengich , counsel for defendant at the jury trial, was so well prepared that he not only knew of the Skidmore case, he also made tactical use of that subject. (See trial transcript, Vol. II, p. 113). Since Mr. Yengich was aware of the Skidmore incident, he skillfully used this evidence in a very narrow manner, thereby creating an impression in the mind of the jury while avoiding a potentially devastating factual rejoinder by the prosecution. He cross-examined Mr. Ruiz concerning Ruiz getting "Lalo" to return from Mexico to the United States to face the

charge that "Lalo" murdered Mr. Skidmore. "Lalo" was later convicted or the Skidmore murder.

10. Since the trial, the defendant's current lawyers, Mr. Parnes and Mr. Gold, have obtained the file from the Rio Blanco District Attorney's Office in Colorado. That file was never in the possession of the Utah Attorney General's Office or members of the prosecution team from the Duchesne County Attorney's office.

11. Mr. Wallentine, from the Uintah County Attorney's Office, assisted the Duchesne County Attorney's Office early in the investigation of the killings of Rex Tanner and June Flood by helping prepare some search warrants. He was never a prosecutor in this case.

12. Prior to an incident in Vernal in August of 1998, when Ruiz was arrested along with the defendant, John Pinder, Mr. Wallentine has no memory of the name Filo Ruiz. The Court enters the following:

CONCLUSIONS OF LAW

1. "It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). A prosecutor's failure to disclose exculpatory evidence violates a defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Agurs*, 427 U.S. 97 (1976).

2. This obligation applies equally to impeachment evidence and to evidence that was not

requested by the defense. *United States v. Bagley*, 473 U.S. 667, 676, 682 (1985). But newly discovered evidence does not warrant a new trial where its only use is impeachment. *State v. Boyd*, 2000 UT 30.

3. "[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make the disclosure when the point of 'reasonable probability' is reached. This, in turn, means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 427.

4. "This rule encompasses evidence 'known only to police investigators and not to the prosecutor.'" *Strickler v. Greene*, 527 U.S. 263 (1999) [citing *Kyles*].

5. "[T]he government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result." *Id.* at 439. This is consistent with the Court's long held view that "a prudent prosecutor will resolve doubtful questions in favor of disclosure." *Agurs*, 427 U.S. at 108.

6. Even though an "open file" policy is not mandatory, the United States Supreme Court has noted that "this practice may increase the efficiency and fairness of the criminal process." *Strickler*, 527 U.S. at 283, n. 23. And, "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady." *Ibid.* Here, the

prosecution maintained an "open file" policy and provided defense counsel a duplicate of the prosecution's files in this case, totaling 5,604 pages of information, together with a courtesy copy of the prosecution's index.

7. In *Kyles*, 514 U.S. at 434-437, the United States Supreme Court explained the materiality test established in *Bagley*. The Court held that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* at 434. The question is "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Ibid.*

8. The Court then stressed that the proper test is not a sufficiency of the evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." *Id.* at 435.

9. The Supreme Court held that the suppressed evidence must be examined "collectively, not item by item." *Id* at 436. Thus, in each case, the full breadth of the suppressed evidence must be considered, and a court cannot diminish the effect of the evidence by considering the items independently.

10. Applying these general principles and those announced in *State v. Spry*, 2001 UT 75, the prosecution had a duty to disclose the information possessed by the Uintah County Sheriffs regarding the non-involvement of Ruiz in the Skidmore murder. The prosecution complied with this duty. Duchesne County had no duty to perform an independent investigation in a murder case in Colorado.

11. The Court does not need to reach a finding concerning whether Ruiz actually made a threat against Mr. Skidmore because that event does not negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of any offense with which Mr. Pinder has been charged. Such evidence would have been clearly inadmissible at this trial because of Utah Rules of Evidence 404 and 608(b). The information concerning the Skidmore murder is neither material nor exculpatory to this defendant's charges.

12. The State did not have a duty to obtain any records or evidence about the Skidmore murder from the authorities in Colorado; Rio Blanco District Attorney's Office, Colorado Attorney General's Office, Rio Blanco County Sheriff's Office, Glenwood Springs District Attorney's Office or other office or authority. *State v. Spry*, 2001 UT 75, 21 P.3d 675. Defendant's position that this court should adopt a prosecutorial discovery burden broader than that already specifically rejected in *Spry*, is likewise rejected by this Court.

13. Clearly, the State did not fail to disclose exculpatory evidence. The State did not withhold any discoverable evidence from the defendant concerning the Skidmore murder and the Court

finds no *Brady* violation.

14. As a matter of law, since Mr. Ron Yengich was aware of the Skidmore murder, and he actually cross-examined Filomeno Ruiz concerning his role in the Skidmore matter, choosing to cross-examine Ruiz about his going to Mexico to convince one of the suspects to return to the United States to surrender, there is no discovery violation concerning this subject.

15. There is no basis as a matter of law or fact, to support defendant's claim of discovery violation. Further, since the ineffective assistance of counsel claim has been withdrawn, defendant cannot now claim that his trial counsel failed in their responsibility to develop this evidence or did not act in a reasonably diligent manner.

IV. THE ALLEGED DISCOVERY VIOLATION CONCERNING MR. RUIZ'S ALLEGED INVOLVEMENT IN THE "MEXICAN MAFIA" AND IN DEALING ILLEGAL DRUGS

The defendant alleges that Filomeno Ruiz was involved in the "Mexican Mafia" and in dealing drugs in Uintah County and that the prosecution withheld such information from the defense. The Court enters the following:

FINDINGS OF FACT

1. Mr. Kenneth Wallentine, who was a Deputy Assistant Uintah County Attorney, testified that he didn't believe a "Mexican Mafia" existed, or exists now and he believed it to be a pejorative, "racist term." The Court finds his testimony credible and finds that mere rumors of the "Mexican Mafia" do not constitute evidence of the existence of a "Mexican Mafia."

2. On February 26, 1999, the prosecution provided the defendant with page 3561 of the discovery file. That document informed the defendant that Mike Sweat, who was a defense witness at this trial, had talked about the "Mexican Mafia," that Mr. Ruiz knew and associated with the people responsible for the murder of Mr. Skidmore and that the Uintah County Sheriff's Office thought that Mr. Ruiz was "involved with the Mexican Mafia." The defense was aware of these rumors and therefore aware of this information before trial.

3. Mr. Gary Potter, investigator for defendant, investigated the rumor that Mr. Ruiz was involved as part of the "Mexican Mafia" and provided the information to Mr. Yengich prior to the trial of this case.

4. The prosecution had no additional information in its files concerning the "Mexican Mafia."

5. The defendant called several witnesses who testified concerning Mr. Ruiz's drug dealing and made allegations about Ruiz's violent episodes, including allegations that Ruiz admitted to prior homicides. (Tom Deleon, Vol.16, pp. 14-17; Mike Sweat, Vol. 16, pp. 32-37; Bud Court, Vol. 16, pp. 57-59.) Finally, the defendant testified that he knew that Ruiz was selling drugs (Vol. 17, p.35), was a dangerous person (p.48), was violent (p.49), and was a member of the "Mexican Mafia" (p.86).

6. Mr. Yengich cross-examined Mr. Ruiz about whether he was a member of the "Mexican Mafia". Mr. Ruiz was then cross-examined by Mr. Yengich concerning drug sales, and Mr. Ruiz admitted he used to sell drugs.

7. The defense made subtle tactical use of the reference to the "Mexican Mafia." To paint Mr. Ruiz as being heavily involved in the "Mexican Mafia" would potentially be a poor choice of defense tactics and would paint the defense inescapably into a corner. It would play into the State's argument that Mr. Pinder hired Mr. Ruiz as a thug, enforcer, and hired goon. As pointed out by the prosecution, Ruiz wasn't driving a Mercedes, living in a mansion, or wearing Italian suits. Instead, he was living with John Pinder in his ranch house, driving an older vehicle, and shoveling ostrich dung. The Court notes that one door of the ranch house even opened directly into a lion's pen.

CONCLUSIONS OF LAW

1. The prosecution provided the information about the rumor that Mr. Ruiz was involved in the "Mexican Mafia."

2. The defense was aware of these allegations and investigated those rumors prior to trial.

3. The use that the defense made of these allegations was a tactical choice.

4. The defense cross-examined Mr. Ruiz concerning both this subject and his involvement in drug sales.

5. The Court finds no evidence of the existence of a "Mexican Mafia."

6. The State did not withhold any discoverable evidence from the defendant concerning the "Mexican Mafia."

7. Evidence concerning the "Mexican Mafia" does not negate the guilt of the accused, mitigate

the guilt of the defendant, or mitigate the degree of any offense with which Mr. Pinder has been charged.

8. There is no basis, as a matter of law or fact, to support defendant's claim of alleged discovery violation concerning Mr. Ruiz's alleged involvement in the "Mexican Mafia" or dealing illegal drugs.

V. THE ALLEGED DISCOVERY VIOLATION CONCERNING ALLEGATIONS OF POLICE CORRUPTION IN THE UINTAH BASIN

The defendant complains that there was police corruption in the Uintah Basin and that the prosecution withheld this evidence from the defense. The Court enters the following:

FINDINGS OF FACT

1. There was a lengthy investigation conducted by the federal authorities into allegations of police corruption in the Uintah Basin. (Emphasis added).

2. As a result of that investigation, no probable cause was found to believe that any criminal activity had occurred and no criminal charges were ever brought by federal, state, or local authorities as a result of the F.B.I. investigation.

CONCLUSIONS OF LAW

1. This matter is tangential and of little relevance to the trial of this case and the Court is unaware of any information that would be admissible at trial.

2. Mr. Gary Potter, the defense investigator, was aware of general allegations of police

corruption in the Uintah Basin, and he investigated these matters. He provided the results of his investigation to Mr. Yengich before trial.

3. The allegations of police corruption in the Uintah Basin do not negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of any offense with which Mr. Pinder has been charged.

4. The State did not have a duty to obtain any records or evidence from the federal government about a federal agency's investigation. *State v. Spry*, 2001 UT 75, 21 P.3d 675.

5. Since the defendant knew of these allegations and investigated them before trial, the State did not withhold any discoverable evidence from the defendant concerning these allegations.

6. There is no basis, as a matter of law or fact, to support defendant's claim of alleged discovery violation respecting allegations of police corruption in the Uintah Basin.

VI. THE ALLEGED DISCOVERY VIOLATION CONCERNING PLEA NEGOTIATIONS WITH MR. RUIZ.

The defendant complains that no memorandum was made concerning the negotiations that preceded the final plea agreement with Mr. Ruiz. The defendant complains that the State's failure to document the negotiations and to turn over to the defense the substance of the negotiations prior to reaching an agreement resulted in the defendant being unable to examine Mr. Ruiz regarding the process by which he entered his plea and his unwillingness to testify unless he received a better deal. The Court enters the following:

FINDINGS OF FACT

1. Plea negotiations preceded the final plea agreement between the State and Mr. Ruiz.

2. At one point in the negotiation process, the prosecution sent a letter to the Department of Corrections making an inquiry. That letter contained the terms of an offer that was then on the table. That offer is not what was finally agreed upon.

3. That letter was not provided by the State to the defendant.

4. In a scheduling conference held September 24, 1999, the potential of a plea agreement being reached with Mr. Ruiz and how it would affect the trial date in this defendant's case were discussed amongst Mr. Wims, Mr. Yengich, and Judge Anderson. At that conference, Mr. Wims said: "We've made, actually over the course of the last couple months, two different offers. The one that is currently on the table we have represented to counsel to be our final offer."

5. Mr. Yengich knew that plea negotiations with Ruiz's counsel preceded the plea agreement reached between the State and Mr. Ruiz.

6. Mr. Ruiz did conclude a plea agreement with the State and entered pleas consistent with that plea agreement.

7 The terms of the final plea agreement were fully disclosed by the State to the defendant.

8. The jury in this case was provided with a copy of the complete plea agreement.

9. Mr. Yengich cross-examined Mr. Ruiz at length concerning the plea agreement, and also argued to the jury concerning the plea agreement. At any time during his cross-examination of

Mr. Ruiz, Mr. Yengich could have asked questions concerning the plea agreement negotiations that preceded the final plea agreement.

10. There is no basis, as a matter of law or fact, to support defendant's claim of discovery violation respecting plea negotiations with Mr. Ruiz.

CONCLUSIONS OF LAW

1. This issue is disposed of by *State v. Bisner*, 2001 UT 99, 37 P.3d 1073 ¶ 40. Because the defendant's counsel was aware that plea offers were made to Mr. Ruiz before the final offer was agreed upon, and the State provided a copy of the final plea agreement, and any previous offers could have been explored by simply asking Mr. Ruiz about them, the State cannot be said to have withheld exculpatory information.

2. There is no discovery violation concerning this subject.

VII. THE ALLEGED DISCOVERY VIOLATION CONCERNING MR. JAMES HILL'S TELEPHONE CALL TO THE DUCHESNE COUNTY SHERIFF'S OFFICE.

It is alleged that early in the investigation into the deaths of Rex Tanner and June Flood, Mr. James Hill called the Duchesne County Sheriff's Office and provided information concerning David Brunyer, which information was exculpatory regarding the defendant and that the prosecution failed to provide discovery of this matter. It is also alleged that David Brunyer called Mr. Hill and left a threatening message on Mr. Hill's answering machine, a copy of which Mr. Hill provided to a "government official." It is also alleged that the prosecution's failure to provide this

tape recording was a discovery violation. The Court enters the following:

FINDINGS OF FACT

1. James Hill is the brother-in-law of David Brunyer, who testified in this case.

2. Early in the investigation, Mr. Hill read newspaper reports about the murder investigation in this case. He read David Brunyer's name in one of those newspaper reports.

3. Mr. Hill spoke by telephone to Lt. Travis Mitchell of the Duchesne County Sheriff's Office. Mr. Hill related to Lt. Mitchell that David Brunyer was a liar, a drug user, and that Brunyer had at one time shown Hill a 30.06 weapon which Brunyer said he had made into a fully automatic weapon. Mr. Hill also said that Brunyer had "det cord" at Brunyer's mother's place.

4. The police were aware of credibility issues concerning David Brunyer and had previously decided not to rely solely on anything Mr. Brunyer told them, without independent corroboration.

5. No memorandum was made of this call and, as a result, this phone call was not part of the discovery in the files of the prosecutors and therefore not provided to the defense.

6. David Brunyer called and left a threatening message on Mr. Hill's answering machine.

7. Mr. Hill gave a copy of the answering machine message to somebody in the State Office Building. Mr. Hill does not know to whom he gave the copy of the message. Mr. Farnsworth, an investigator for the State, has worked with Mr. Hill in an attempt to determine who Mr. Hill gave the tape to, but those efforts have been unsuccessful.

8. Mr. Hill telephoned Mr. Yengich and as a result ended up speaking with the defense

investigator, Mr. Gary Potter, in a face-to-face interview before trial. He related to the investigator the same things he had related to Lt. Mitchell, and told the investigator about the threatening telephone message from David Brunyer. He told the defense investigator everything he thought the defense should know about David Brunyer including the topics of credibility, criminal activities, drug usage, involvement with guns, explosives, and of Brunyer's threatening behavior. The defense investigator, Mr. Potter, provided all of that information to the defendant's defense counsel prior to trial in this case. (Emphasis added).

CONCLUSIONS OF LAW

1. This issue is disposed of by *State v. Bisner*, 2001 UT 99, 37 P.3d 1073 ¶ 40, because Mr. Hill contacted the defense counsel, was interviewed by the defense investigator and all of these matters were related to the defense counsel before trial.

2. There is no basis, as a matter of law or fact, to support defendant's claim of alleged discovery violation respecting Mr. James Hill.

VIII. THE ALLEGATION CONCERNING MRS. LEANN HILL'S TESTIMONY.

The defendant alleges that Mrs. LeAnn Hill, who is David Brunyer's sister, read newspaper reports concerning the murder investigation. Upon reading the newspaper articles about the murders, she believed that David Brunyer was involved in murdering the two victims. She read in the newspapers statements like "vaporize them" and "like a Timex, it keeps on

ticking." She believes that these are the types of words David would use and attribute to someone else. She also knows her brother used drugs and was involved in drug dealing, although she does not specify when this occurred or whether she personally observed this. She also said her brother has experience using explosives and had some det cord at their mother's house in Salt Lake. David, she says, is not credible. The defense does not allege a discovery violation. A stipulation and her testimony are before the court. In the defense Supplemental Memorandum, the defense alleges that Leann Hill's information corroborates Joey Silva's testimony. However, the defense does not allege that Leann Hill is a newly discovered witness. The Court enters the following:

FINDINGS OF FACT

1. Leann Hill's statements, as summarized above, are before the Court through the testimony of Leann Hill and through a stipulation.

2. She did not relate this information to the investigators for the State, but she did provide this information before the trial to Mr. Gary Potter, the defense investigator, who investigated those matters and related them to the defense counsel before trial. (Emphasis added).

3. She has no personal knowledge of the killings of Rex Tanner or June Flood.

4. She has offered no testimony concerning statements attributable to Filomeno Ruiz or to Joey Silva, nor does she claim to have been present at the Duchesne County jail on July 4, 1999.

5. The substance of Joey Silva's testimony consists of statements he attributes to Filomeno Ruiz

allegedly made to him on July 4, 1999, while both were incarcerated at the Duchesne County jail.

CONCLUSIONS OF LAW

1. Mrs. Hill's testimony does not corroborate Joey Silva's testimony as she has not testified to any statement attributable to Joey Silva or to Filomeno Ruiz, nor does she claim she was present in the Duchesne County jail when Silva claims that Ruiz confided in him.

2. Testimony that upon reading the newspaper accounts of the murder investigation Mrs. Hill thought that her brother must be involved and testimony that the phrases were of the type her brother might use and attribute to someone else is not admissible in evidence as such is prohibited by Utah Rules of Evidence 701, 608, and 403. It is speculative. (Emphasis added).

3. Since the defense knew of this witness and these matters before trial, this is not newly discovered evidence and it would have been, as a matter of law, reversible error to allow her to testify as to her speculations, thoughts and impressions.

IX. THE ALLEGATION CONCERNING CHRISTINA MOELLMER'S TESTIMONY.

Christina Moellmer is the sister of David Brunyer. In her stipulated testimony, she claims that in 1996, David Brunyer was in the possession of detonating cord and that he got in an argument with their brother, Steven, and David threatened to blow up Steven's house. She does not say whether she knows this from personal observation. She also claims that in December, 1996, David bragged that the explosives were enough to blow up the entire block. Shortly after

the homicides in this case, Ms. Moellmer called the Duchesne County Sheriff's Office because she wanted to make sure David's children were alright. Prior to the trial, she was not contacted by the defense counsel. When she read an article in a newspaper that attributed a statement about a Timex watch to John Pinder, she recognized that statement as something that her brother, David, might say. She does not believe her brother is credible, and she is frightened of him. The Court enters the following:

FINDINGS OF FACT

1. Christina Moellmer's statements, as summarized above, are before the Court through a stipulation of testimony.

2. She is David Brunyer's sister.

CONCLUSIONS OF LAW

1. Her opinion concerning the "Timex watch" statement is complete speculation and tangential.

2. Her testimony concerning "det" cord and explosives is cumulative to Scott Johnson's testimony, which was heard at trial, that David Brunyer knew explosives and used explosives extensively.

3. Her testimony that David Brunyer threatened to blow up a house in 1996 and that she is afraid of him is not admissible because of Utah Rules of Evidence 404, 608(b), and 402. If her testimony were to be offered for the purpose of showing David Brunyer knew explosives and

used explosives it would be cumulative. If offered to show bad character, it is cumulative to all of the bad character evidence that was admitted without objection regarding David Brunyer.

4. Her opinion concerning David Brunyer's credibility is cumulative to the numerous attacks upon David Brunyer's credibility admitted at trial, without objection.

5. This is mere impeachment and does not rise to the level of newly discovered evidence. *State v. Boyd*, 2000 UT 30.

X. THE ALLEGATION CONCERNING GENE KELLY'S TESTIMONY.

Mr. Kelly alleges that in 1996, David Brunyer asked him to kill some people who David said had stolen from him in a drug deal. Mr. Kelly also said he has seen David in possession of a rifle but does not specify where or when. He claims that David said that once David had planted a gun inside the home of two people who were on parole and then called the police to report the gun. The Court enters the following:

FINDINGS OF FACT

1. Gene Kelly's statements, as summarized above, are before the Court through a stipulation of testimony.

2. Mr. Kelly is a convicted felon who, since 1975, has been convicted of 18 felony offenses, including drug offenses, burglary, auto theft and crimes of dishonesty, including forgery. He has served prison sentences in both California and Utah. He was released most recently in January,

2002.

3. Mr. Kelly has a motive to dislike David Brunyer. He describes how he and David Brunyer got into an argument in September, 1996, and says that David fired a rifle at him. He describes David calling the police and keeping the gun on him until the police arrived. Kelly was arrested at that time for an outstanding warrant. He claims that Brunyer was arrested for aggravated assault, but that he, Kelly, refused to testify.

4. Mr. Kelly is not a credible witness.

CONCLUSIONS OF LAW

1. Kelly's testimony is not admissible because of Utah Rules of Evidence 404, 608(b), and 402.

2. Mr. Kelly' testimony would also be cumulative to all of the bad character evidence that was introduced without objection concerning David Brunyer.

3. Mr. Kelly's testimony does not negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of any offense with which Mr. Pinder has been charged.

4. This is merely inadmissible impeachment evidence and does not rise to the level of newly discovered evidence. *State v. Boyd*, 2000 UT 30.

XI. THE ALLEGATION THAT TESTIMONY FROM JOEY SILVA, CHRISTY BARNES, AND ROBERT BRUNYER WARRANTS A NEW TRIAL AS NEWLY DISCOVERED EVIDENCE.

The defense claims that Joey Silva, Christy Barnes, and Robert Brunyer are newly

discovered witnesses and that the substance of their testimony merits a new trial for the defendant. Mr. Silva, an inmate in the Utah State Prison, testified that at the Duchesne County jail on July 4, 1999, Filomeno Ruiz confided in him during a picnic in "the yard" that Ruiz and a white guy who went to the police killed a female and another guy, and that the defendant, John Pinder was not involved in the actual killing, but was involved in disposing of the bodies. Robert Brunyer is the brother of David Brunyer. Christy Barnes, an inmate at the Utah State Prison, was Robert Brunyer's girlfriend and cohabited with Robert Brunyer during the Summer of 2001. They claim that David Brunyer said he was with Filomeno Ruiz when Ruiz killed Rex Tanner and June Flood and that the defendant, John Pinder, was not present. The Court will deal with the testimony of each witness in turn and then the three of them together.

A. Joey Silva

The Court enters the following:

FINDINGS OF FACT

1. Joey Silva is an inmate in the Utah State Prison with an extensive criminal history and a prior prison history. Silva's convictions include attempted distribution, drug tax violation, attempted burglary, damage to a jail, and a second degree felony communications fraud.

2. Joey Silva has used numerous false names including:
    a. John Danforth
    b. John Paul Danforth
    c. Jose Silva
    d. Paul John Danforth
    e. Pedro Andrade

f. Joseph Silva

3. Some of these aliases have been used in Utah courts and the record has never been corrected by Joey Silva. He has been charged with crimes other than in the name of Joey Silva and has been on parole / probation under a different name than Joey Silva. Silva has gone by numerous false names including using a false name in a Utah courtroom.

4. Silva has used different social security numbers and different birth dates.

5. Silva admitted during his testimony that he has scammed people. The communications fraud conviction is reported in *State v. Silva*, 2000 UT App 292. In that decision, the Utah Court of Appeals recounts how Silva almost "bamboozled" his way out of the Davis County jail by scamming an inmate's brother to put up bond for his brother, but to do so in the name of "Joey Silva."

6. While the jury was deliberating in that case, Silva remarked to the prosecutor, in the presence of Silva's counsel, that what attracted him to Utah from Massachusetts was that Utah people are so easy to scam. This was testified to at hearing by Carvell Harward, Esq., Chief Deputy Davis County Attorney. The *State v. Silva* case demonstrates to what length Mr. Silva will go in order to get out of jail or to seek personal advantage.

7. While serving his sentences at the Utah State Prison, Silva received numerous prison write-ups and developed a lengthy list of other inmates that might be of a safety concern to him (The defense notes thirty five (35) names on Silva's protective custody list held by the State of Utah

Correctional Administrators. The State notes over fifty (50) names on Silva's protective Custody List). As a result of the lengthy safety concern list, Silva spent much of his time in maximum security.

8. Silva made several requests to be placed at county jails, rather than in maximum security. Silva also traded information in return for more favorable placements. At one time he was transferred to the Duchesne County jail and on another occasion to the Tooele County jail. On more than one occasion, he was returned to the prison due to his misconduct at the jails.

9. In the year 2000, Silva requested that he be transferred to the Idaho State Prison. That request was pending when the trial in this case ended on August 4, 2000.

10. Within days after the trial of this case, an unidentified female called Mr. Yengich's office and provided information that resulted in Mr. Gary Potter, the defense investigator, interviewing Joey Silva. Silva told Mr. Potter that when Silva was in the Duchesne County jail, he had met Filomeno Ruiz. Silva told Potter that on July 4, 1999, Ruiz had confided in Silva that Ruiz along with a "white guy who went to the police" were the killers in this case and that the defendant was not involved in the actual killing but was involved in disposing of the bodies.

11. Potter was aware that the report to Mr. Yengich's office had allegedly come from one of Silva's girlfriends. Potter "felt that it was extremely important to corroborate" what Silva told him. Potter explained to Silva the importance of Potter talking to Silva's girlfriend to corroborate whether Silva had said this to his girlfriend, and if so when. Silva refused to tell Potter the name

of the girlfriend. In fact, Silva's testimony reaches the Court in a very curious manner. (1) Silva telephonically divulges the information sometime in 1999 to a girlfriend who was identified for the first time at the hearing as Lori Stonger (Silva notes the divulgence would have had to occur telephonically because "I couldn't get no visits [sic.] because the record show [sic.] I was married"); (2) The girlfriend (Lori Stonger) evidently tells an unnamed and unidentified friend; (3) the unnamed and unidentified friend (or perhaps Lori Stonger herself) apparently acted independently in August of 2000 to contact Mr. Yengich's Office.

12. Potter asked Silva if he would testify. Silva said he would not unless he was moved because of his fear of "the Mexican connection" at the Utah Prison. Silva then informed Potter that if he was moved to the State of Idaho, then he would not have a problem testifying.

13. Filo Ruiz was in the Duchesne County jail during a period of time while Joey Silva was there, including July 4, 1999. They never were cell mates, and they were always housed in different units.

14. Filo Ruiz denies ever speaking to Joey Silva.

15. Detectives Wally Hendricks and Ken Farnsworth interviewed Silva at the prison on August 9, 2001, concerning these allegations. Silva refused to allow the interview to be recorded. Silva was asked about what he had told Potter regarding the conversation he allegedly had with Filo Ruiz. Silva refused to respond. He said he wasn't going to testify. Silva told Hendricks that if he were called as a witness, he would lie. Silva also told them that if he were again moved from a

prison to a jail, he would then testify. (Emphasis added).

16. Both detectives again attempted to interview Silva on January 3, 2002. Silva again refused to make a statement. Silva said he wasn't going to sign anything or swear to anything because of fears that he could be charged with perjury. The Court further notes that Silva refused to be tape-interviewed at any stage for fear of being charged with perjury. He refused to confirm or deny he had been offered financial assistance for his involvement. (Emphasis added).

17. Mr. Silva picked Filo Ruiz out of a set of eight photographs of Hispanic inmates from the Duchesne County jail.

18. The Court scheduled a hearing in January of 2002, but Silva did not testify at that hearing as Silva had not been moved to Idaho.

19. Silva told representatives for the defense that if he were paroled, he would feel more comfortable testifying. It was represented to the Court that Silva would testify after Silva was released on parole, which was scheduled for July, 2002. The Court set a date for a hearing to be conducted shortly after Silva was scheduled for release on parole for the purpose of hearing Mr. Silva's testimony.

20. Rather than appear, Mr. Silva absconded from parole after being released from the prison. Because he was a fugitive from justice, the hearing was again delayed. It seems obvious to this Court that Silva's decision to testify or not to testify related directly to his self-serving advantage. Absent the possibility of advantage to self he simply absconded and delayed the hearing for

months. This self-serving decision casts very serious doubt on his motivation.

21. Mr. Silva was returned to prison for parole violation. The Court again scheduled a hearing for November, 2002, for the purpose of receiving Mr. Silva's testimony. Shortly before the hearing, Silva signed a letter to the defense that he was still unwilling to testify unless, due to his safety concerns, he were transferred to one of four county jails in Utah. He even specified which four jails were acceptable to him. It is obvious to the Court that Silva had successfully and prolifically made numerous enemies while housed in prison. The day before the hearing, Silva was informed that the Attorney General's Office had made arrangements for him and he was going to be moved after testifying to one of the four jails he had specified.

22. On November 19, 2002, Silva testified to the substance of what he told Mr. Potter, concerning Filo Ruiz confiding in him that Filo was guilty of murder along with a "white guy who went to the police." He claimed that Ruiz confided to him that they had a confrontation with the victims at their trailer and they were then taken to a lake where Ruiz shot both victims. Silva also claimed that Ruiz said that the defendant, John Pinder, was not involved in the actual killing, but was involved in disposing of the bodies. Further, Silva testified that Ruiz told him that Ruiz had called "some Mexican people" to go to the white guy's trailer and threaten him to collaborate in saying the story they wanted to hear.

23. It is unclear to this Court whether this conversation, if it occurred, took place in English or Spanish, or whether Joey can speak Spanish. Joey testified with an extremely heavy, tough street-

wise Massachusetts / North Eastern accent. The Court notes that Ruiz testified at trial through the services of a certified Spanish court interpreter. But the Court is aware from the trial that Ruiz also spoke broken English.

24. Internal records reflect that Joey Silva has been used by both state and federal authorities as a confidential informant over the years. Records reflect that some information he supplied resulted in convictions, and at some stages of his confidential informant history, he was considered to be reliable.

25. After hearing from Silva, the Court heard from numerous witnesses who testified to Silva's lack of credibility and his manipulative character.

26. John Carter testified that he had worked with Probation and Parole for 20 years. Carter testified that he was Joey Silva's parole officer from June 1996 until January 1997 when he violated parole. He knew Silva was known on the streets as "Paul Danforth." Silva was an "intense parole individual" and Carter saw him almost daily in one capacity or another. Carter testified that in his work with probation and parole that Silva "was probably one of the most manipulative individuals [he] had ever known." Carter testified that he was aware of Silva's reputation in the community and further that Silva was unreliable, very deceitful and that he could not tell the truth under oath.

27. Kevin Fielding testified that he has been a peace officer for over 20 years and currently was a Lieutenant in the Investigations Division of the Davis County Sheriff's Office. He was initially

acquainted with Joey Silva, whom he also knew went by the names of Paul Danforth and Pedro Andrade, from 1993 up until September of 2002. Fielding testified that he was aware of Silva's reputation and character for truthfulness. Fielding stated that Silva is "extremely manipulative of individuals that he associates with" and "Joey Silva may lie when the truth suits him better. Anything he says would be self-serving."

28. Delynn Summers, a case manager/social service worker for the Department of Corrections next testified. He was/is Joey Silva's case manager at the Utah State Prison. He testified that, "it is hard for Joey Siva to live in the general population at the prison [and] that Joey admitted that his mouth got him in trouble with inmates." This resulted in "safety issues" that required moving Silva into a "tighter security facility." Summers also testified as to Mr. Silva's reputation for honesty among prison staff; "He doesn't have a reputation for honesty. It's incredible." Lastly, Summers testified that Silva "makes new information all the time in the form of kites (messages / notes / information to staff) for various reasons" and that Silva has tried to trade information in order to get a different placement.

29. Mark Webb, special agent with the Drug Enforcement Agency (DEA), testified that "Silva cannot be relied on" and "Mr. Silva was not credible in many ways." He further testified that Silva is truthful if it will profit him in some way. He is a very opportunistic person." He additionally testified that he would not rely on what Silva said even if under oath.

30. Kevin Pepper, a criminal investigator for the Department of Corrections, Law Enforcement

Bureau stationed at the Utah State Prison, also testified respecting Joey Silva. He had worked with Silva previously as a confidential informant, found him to be a very difficult informant to manage and recommended that he never be used again as a confidential informant. Pepper testified that he had worked in narcotics since 1989, that he had worked with many confidential informants, and that Joey Silva is not reliable in his book and was probably one of the most manipulative informants he had ever worked with in his career.

31. Portions of Silva's testimony concerning his interviews by investigators for both the defense and the State contradicts Mr. Potter's testimony and is also contradicted by detective Hendricks' testimony. Silva's denial of the use of the alias Pedro Andrade was also directly contradicted by the testimony of Kevin Fielding.

32. Silva refused to answer some basic questions while testifying at the hearing.

33. Defense investigator, Mr. Gary Potter, interviewed Joey Silva at the Utah State Prison on August 9, 2000. Mr. Potter made a report of that interview.

34. At the hearing, Mr. Silva was presented with a copy of Mr. Potter's report. He took exception to the report as not reflective of his interview. Previously at the prison he would neither confirm nor deny the accuracy of the report.

35. The Court finds the testimony of the numerous witnesses who contradict Silva or who opine that he lacks credibility and is very manipulative, are persons in positions of trust: police officers, a prosecutor, law enforcement officers in probation and parole, correctional officers, and the

defense investigator. Their testimony is more persuasive than the testimony of this inmate. Mr. Silva's manipulations in this case are apparent and the Court finds that Silva is a "bamboozler" and professional scam artist and lacks credibility. The Court finds it difficult to conceive of a less trustworthy witness.

36. The Court is not persuaded that Filo Ruiz ever spoke to Joey Silva and so finds.

B. Robert Brunyer

Robert Brunyer is the brother of David Brunyer. Robert Brunyer claims he heard David Brunyer say that David was present when Rex Tanner and June Flood were murdered by Filo Ruiz and that the defendant, John Pinder, was not present. Robert Brunyer's allegations were not known to the defense until after the trial.

The Court enters the following:

FINDINGS OF FACT

1. Robert Brunyer is the brother of David Brunyer.

2. In 2001, Robert Brunyer resided on land near where David and Shirley Brunyer lived in Duchesne County. Christy Barnes, Robert Brunyer's girlfriend, also resided with Robert during some of this time.

3. In November, 2001, Robert Brunyer was arrested for felony theft of a firearm. While in jail in December, 2001, he was interviewed by Mr. Todd Gabler, a new investigator for the defense in

this case. He provided Mr. Gabler with a written statement on December 18, 2001.

4. In Robert Brunyer's written statement that he provided in December, 2001, Robert Brunyer wrote that his brother, David Brunyer, had said:

> That John Pinder was involved in the murders of Rex Tanner and June Flood. That while John and Filo were doing drugs with David, that John and Filo were saying that a woman named June Flood had been stealing money and drugs, and that John and Filo suspected her boyfriend, Rex Tanner, was in on it too. John and Filo went over to Rex's house to confront June and Rex about the money and the drugs. John and Filo took a baseball bat and that it was John that beat Rex with a **bat.**

5. Robert Brunyer later plead guilty. Prior to Robert Brunyer's conviction on felony theft charges, his lawyer showed him a videotape of David Brunyer telling the police that Robert Brunyer and Christy Barnes had committed a burglary and theft. Robert Brunyer's felony conviction was the result of information that David Brunyer provided to the police and Robert Brunyer knew that. Robert Brunyer spent six months in jail as a result of David Brunyer turning him in.

6. After Robert Brunyer was released from jail, he received a telephone call from his sister, Leann Hill, who was convinced that her brother, David Brunyer took part in the murder of Rex Tanner and June Flood. This telephone call took place in November, 2002. Leann Hill greatly

encouraged Robert Brunyer to contact the defense. Robert Brunyer admitted that his sister not only encouraged the contact but that she got upset with him and that "she jumped all over [his] ass." At the evidentiary hearing, Attorney Wims asked, "So it was after LeAnn called that you decided to say that David was involved in the murders?" Robert Brunyer responded, "Yeah. That's part of it."

7. In November, 2002, Robert Brunyer contacted the defense and provided Mr. Gabler with an affidavit and submitted to interviews. In the November, 2002, affidavit and interviews Robert Brunyer changed what he had previously written in December, 2001, from"John and Filo" to "David and Filo."

8. Robert Brunyer admitted on cross-examination that David did not actually say that he was present during the murders. Robert Brunyer admitted on cross-examination that he "assumed" David was there because of how David recounted what had happened and it sounded to Robert as if David was there. Robert Brunyer also admitted that when David used the word "they" that he assumed David meant "he." Robert Brunyer also admitted that he simply feels that what David had told him was not true, which is why Robert changed "John and Filo did it " to "David and Filo did it." (Emphasis added).

9. Robert Brunyer testified at the hearing on the new trial that David Brunyer told him that Filo threatened to kill him, David Brunyer, and David's family, if David did not testify that Filo and John Pinder committed the murders. The Court found this testimony so flabbergasting,

preposterous and bizarre that the Court, sua sponte, asked a clarifying question with the same result. The Court also inquired of the drinking habits of the witness at the time this statement was allegedly made. The Court was then left to wonder why Ruiz would threaten to kill David Brunyer and his family if David Brunyer did not testify that he, Ruiz, committed the murders.

10. The idea that Filo Ruiz threatened David Brunyer unless David Brunyer would incriminate Filo Ruiz in two capital murders is inherently unbelievable. Robert Brunyer is not a credible witness.

11. Robert Brunyer admitted he had been drinking heavily during the time that David Brunyer is alleged to have said these things. Robert and David Brunyer had been drinking during most, but not all, of their conversations about the murders.

12. Robert Brunyer has a motive to dislike David Brunyer. Robert Brunyer changed his story in a crucial way, from alleging that David said "John and Filo" did it to alleging that David said "David and Filo" did it. Robert Brunyer admitted that David Brunyer never said that he, David, was present at the time of the murders. David Brunyer testified at the hearing on the new trial that he was not present at the killing Flood and Tanner and that he had never told Robert Brunyer that he was present at the killings.

13. Robert Brunyer's testimony also impeaches Christy Barnes because Barnes said that David's statements were made in the presence of Robert Brunyer, and Robert Brunyer admitted on cross-examination that David did not make such statements.

14. Robert Brunyer initially gave one version of testimony to the defense (Version I). He later materially and significantly changed that version (Version II). At hearing, under oath and under the scrutiny of cross-examination, Robert Brunyer again materially and significantly changed his testimony and engaged in yet a third version of testimony (Version III). His credibility fully collapses when he now admits under oath that certain things were never said or admitted by his brother, David Brunyer, but he, Robert Brunyer, based his testimony on:

a. "assumptions;"

b. "guessing;" (He admitted that some things he told the defense investigator, Gabler, were guesses.)

c. "I couldn't be sure;"

d. "feelings;" ("I feel like it wasn't true." He based his testimony, not on what he heard his brother say, but his (Robert's) feelings about what David Brunyer did say. At one point he admitted that David Brunyer did "not directly [say that] but I believe...")

e. "It sounded like to me;" (Robert Brunyer testified that David Brunyer's conversation "sounded like David was there." "It sounded like he was a material witness to all of it.")

f. "personal beliefs and wonders" (When asked whether David told him he was personally present at the time of the killings, Robert Brunyer responded: "He didn't come straight out and say he was present, but he knows quite a bit about it. Makes you wonder.")

15. Some of the confusion and inconsistencies can be attributable to a blurred memory because of

heavy drinking which Robert Brunyer testified occurred "pretty much every day." He further testified to the fact that whenever he heard David talking about the murders that he (Robert) had been drinking "unless we were working."

16. Confusion and different versions may also be attributable to Robert's lack of attention and his deliberate attempt to ignore Mr. David Brunyer's statements. Consider: "Well, see, at that time...it's not like I was trying to pay attention to what he was saying. In fact, some of it I tried to even ignore." (This statement was made by Robert Brunyer to defense investigator, Todd Gabler, and was admitted under oath by Robert Brunyer at the February 21, 2003 hearing.)

17. Robert Brunyer's testimony is not credible and much of his testimony is inconsistent with absolutely established, known and undisputed facts.

C. Christy Barnes

Christy Barnes, an inmate at the Utah State Prison, alleges that when she was cohabiting with Robert Brunyer during the summer of 2001, she heard David Brunyer say 40 to 45 times that he was present when Rex Tanner and June Flood were murdered by Filo Ruiz and that the defendant, John Pinder, was not present. Christy Barnes' allegations were not known to the defense until after the trial.

The Court enters the following:

FINDINGS OF FACT

1. Christy Barnes is an inmate at the Utah State Prison. During a portion of 2001, she cohabited with Robert Brunyer, David Brunyer's brother. They lived about a mile away from David and Shirley Brunyer.

2. Barnes has a drug felony conviction in 1993 for which she served time. She was arrested for theft in November, 2001. This resulted in her second felony conviction which was for a firearm violation. Barnes was paroled on November 19, 2002. When she testifed on Feb. 21, 2003, she was back in prison.

3. Barnes testified on direct examination that she thought David Brunyer was responsible for providing information that resulted in her arrest for theft.

4. Barnes was interviewed by an investigator for the State, Ken Farnsworth. On cross-examination Barnes testified that it was someone other than David Brunyer who turned her in and the first time she had heard it was David Brunyer who turned her in was when Mr. Farnsworth interviewed her.

5. During the interview Barnes told Mr. Farnsworth that she had not used any drugs for many many years. That was a lie.

6. Barnes stated that David Brunyer threatened her 20 to 30 times. Barnes also stated that she continued to associate with David Brunyer and his wife after that and tried to attend a birthday party at David and Shirley Brunyer's. She admitted that at the birthday party she got into a hassle

with David and Shirley Brunyer and they kicked her out of the party.

7. Barnes stated that David Brunyer said that he, David Brunyer, used a bat on one of the people who died, Rex; that David Brunyer said he was present when Rex Tanner and June Flood were murdered and that John Pinder was not there; that Filo Ruiz was the one that shot Rex and June. She also said that David Brunyer said he was paid $22,000 for telling his story.

8. Barnes stated that when she heard David say these things, David had been drinking, that Robert Brunyer had been drinking and that Barnes had been drinking. She also was using drugs during the time from May to November, 2001. David Brunyer testified at the hearing on the new trial that he was not present at the killing of Flood and Tanner and that he never told Barnes that he was present at the killings.

9. Barnes stated that Robert Brunyer, Shirley Brunyer, and Kevin Williford were present when David Brunyer said these things. Her testimony is contradicted by Shirley Brunyer and Kevin Williford, as both of those individuals testified they never heard David Brunyer say such things. More importantly, her testimony is also contradicted by defense witness, Robert Brunyer, as he admits that David never said that David participated in the murders, but that David said John and Filo were the ones who committed the murders.

10. Christy Barnes has a motive to dislike David Brunyer and is not a credible witness.

11. David Brunyer did not say to Barnes that David Brunyer, used a bat on one of the people who died, Rex; that David Brunyer said he was present when Rex Tanner and June Flood were

murdered or that John Pinder was not there, or that Filo Ruiz was the one that shot Rex and June.

CONCLUSIONS OF LAW AND MIXED FINDINGS OF FACT WITH CONCLUSIONS OF LAW

1. Joey Silva, Christy Barnes, and Robert Brunyer are new witnesses.

2. Rex Tanner and June Flood did not live in a trailer and were not kidnapped from a trailer.

3. The jury heard testimony from Joseph Andrews and from Christie Andrews that David Brunyer had bragged about being paid $25,000 for his testimony. The statement of Christy Barnes that David Brunyer claimed he'd been paid for his testimony is cumulative and impeachment only.

4. The jury heard from Scott Johnson that David Brunyer knew how to use explosives and used them extensively. The testimony from the Hills concerning David Brunyer's familiarity with explosives is cumulative.

5. The jury heard from Christie Andrews that David Brunyer was doing drugs. Additionally, Mr. Yengich cross-examined David Brunyer about his drug use. The testimony from the Hills that David Brunyer was a drug user is cumulative and impeachment only.

6. The Court held this trial from June 26 through August 4, 2000. The Court was able to hear all of the witnesses, see all of the exhibits, and assess the credibility of those witnesses and the testimony presented. Since the Court has been presented with newly discovered evidence that is not merely cumulative, this Court must consider the testimony's probable weight and the

likelihood that a jury would find it credible considering the interplay with the substance of the proffered testimony and with the other evidence offered at the first trial.

7. The Court has found that each of the three new witnesses lacks credibility. The Court must now consider the substance of their testimony and compare it with the substance of the evidence at the first trial.

8. Much of what Robert Brunyer offers in his latest version (Version III) of his testimony contradicts evidence established at the trial. For instance, according to Robert Brunyer's testimony, David Brunyer told him that John Pinder was in Wyoming when the murders occurred. However, the defendant's testimony was that he was at his ranch in Duchesne County the night the murders occurred. So Robert Brunyer's latest version of his testimony, if offered by the defendant, would contradict the defendant's testimony. Another example is that Robert Brunyer claims to have heard David say David was bulldozing the bodies the day after the murder. That, again, would contradict the testimony of the defendant that he, the defendant, was the one bulldozing the bodies the day after the murder. Further, the concept that Ruiz threatened David Brunyer into saying that Ruiz was guilty of two capital murders is simply ludicrous and preposterous and is so farfetched that a jury would not find it credible considering the interplay with the other evidence offered at the first trial. Lastly, Robert Brunyer's version of where the murders took place, the caliber of the weapon used, etc., contradicts evidence established at trial.

9. The "Ruiz did it with David Brunyer" theory has many significant problems and would be

unpersuasive to any finder of fact. It suffers from the problems that were covered in the State's closing argument in this case. The most significant problem is that it puts Ruiz into the position of going to prison for life while protecting David Brunyer, who testifies that Ruiz was guilty. On the Friday after the murders, David Brunyer told the police that Ruiz and Pinder committed the murders. That evening Ruiz was arrested and the next morning Ruiz said that he and Pinder committed the murders.

10. The defendant's strategic choice at trial was to mention the "Ruiz with Brunyer" theory but to argue that Ruiz must have done it alone. This is a wise strategic choice because the "Ruiz with Brunyer" theory has significant logical problems when placed into the context of the evidence the jury actually heard at trial. For instance, the jury heard that DeHart told her daughter the morning after the murders that John and Filo were out all night. The jury heard that DeHart complained to Shirley Brunyer that same day that John and Filo had been out all night. The jury heard that DeHart say that she and the defendant had cleaned the truck and she threw away bloody scalp. Further, the jury heard that the defendant had confessed at three different times. The defendant confessed to David Brunyer and to Newly Welch and the jury heard from both. The jury heard that DeHart told her daughter that John Pinder had told her he killed the ranch-hand and his girlfriend by shooting them and blowing them up.

11. While the Court watched the trial in this case, the Court was struck by the demeanor and testimony of the three principal witnesses for the defense: Joe Wallen, Barbara DeHart, and the

defendant. Joe Wallen contradicted his own previous statements and contradicted Barbara DeHart and the defendant's testimony. Barbara DeHart contradicted her own sworn testimony at her trial and contradicted Wallen and the defendant's testimony. Most importantly, the defendant contradicted his previous statements made at a KSL interview, contradicted Wallen and DeHart, and astonishingly even changed his testimony on the witnesses stand. It was apparent to the Court, and to the jury, that the defendant lied on the witness stand. It was the defendant's incredible testimony and the defendant's incredible witnesses that contributed greatly to his conviction.

12. If the defense were to re-try this case using the "Ruiz and Brunyer" theory, the Court is persuaded that if the jury heard from these three witnesses the result of the trial would be the same. Changing to the "Ruiz did it with Brunyer" theory based on these three witnesses who lack credibility would not explain how Bernie Knapp knew that there were bodies in Duchesne County, Utah, of a ranch-hand and his girlfriend and that they had been shot before they were blown-up. Knapp had been told that by his daughter, Barbara DeHart, who claimed that everything she knew about the murders had been told to her by the defendant. Nor would the new witnesses overcome the self-contradictory and unbelievable testimony offered by the defendant, whose testimony also contradicted his two key witnesses.

13. The Court finds from all of the evidence offered at the trial and offered at the numerous evidentiary hearings after the trial that Rex Tanner and June Flood were murdered by John Pinder

and that Filomeno Ruiz was a party to those murders.

14. The Court has considered the interplay between the substance of the proffered testimony with the other evidence offered at the first trial. Just as the Court has found the newly proffered testimony lacks credibility, the likelihood is that the jury would also find that the newly proffered testimony lacks credibility. The Court finds that the jury would likely conclude, just as the Court has, that the newly proffered evidence is inconsistent with and rebutted by credible evidence established at the trial and is inconsistent with and rebutted by evidence and witnesses offered by the defendant at trial, including the defendant's own testimony. The Court finds that a different result would not be probable on a retrial of this case. In fact, the Court finds that same result on retrial of this case is highly likely.

OTHER OBJECTIONS

All other objections and grounds for new trial are overruled including the matters in the sealed stipulated testimony, for the reasons stated in the State's brief on those matters.

ORDER

The defendant's motion for new trial is denied.

Dated this 13 day of May, 2003

BY THE COURT:

LYNN W. DAVIS, Judge